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# PETITION, RULE, AND RETURN TO RULE.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

NO. 10, ORIGINAL.

EX PARTE: IN THE MATTER OF J. SLOAT FASSETT, PETITIONER.

ON PETITION FOR A WRIT OF PROHIBITION.

**PETITION FILED OCTOBER 19, 1891.**
**RETURN FILED OCTOBER 31, 1891.**

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1 Office Supreme Court U. S. Filed Oct. 19, 1891. James H. McKenney, clerk.

[Supreme Court of the United States. October term, 1891. Original docket No. —. Jacob Sloat Fassett, Collector of Customs for the Port of New York, *vs.* The Judge of the United States District Court for the Southern District of New York. Petition for prohibition.]

2 Supreme Court of the United States. October term, 1891. Original Docket No. —. Jacob Sloat Fassett, Collector of Customs for the Port of New York vs. The Judge of the United States Distrct Court for the Southern District of New York.

*Petition for prohibition.*

*To the Honorable Supreme Court of the United States of America:*

The suggestion of J. Sloat Fassett against the district court of the United States for the southern district of New York respectfully alleges as follows:

He was the collector of customs for the port and collection district of New York from the 13th day of August, 1891, until the 30th day of September, 1891.

On or about the 6th day of July, 1891, Frederick W. Vanderbilt, a citizen of the United States, imported from a foreign country the foreign-built steam yacht Conqueror into the port of New York, and reported her arrival to the collector of customs of said port.

The said J. Sloat Fassett, as collector of customs at the port of New York, on the 27th day of August, 1891, in the performance of his duty under the laws of the United States and in obedience to the following instructions of the Secretary of the Treasury, took possession of and detained said yacht or imported article for the enforcement of the payment of duties thereon:

TREASURY DEPARTMENT,
*August* 21, 1891.

SIR: The question as to whether the yacht Conqueror, which was purchased in England by Mr. F. W. Vanderbilt and brought into the port of New York shall he regarded as a dutiable importation, having been referred to the Solicitor of the Treasury, that officer, under date of 14th instant, advises this Department that said yacht is, in his opinion, liable to duty under the fair intendment of the tariff act.

3 You will accordingly take the necessary steps for the appraisement of said vessel for duty, and the assessment and collection of duty thereupon according to law.

The question as to the liability of said yacht for tonnage tax should be referred by you to the Commissioner of Navigation, under Synopsis 6466.

Respectfully, yours,

A. B. NETTLETON,
*Assistant Secretary.*

COLLECTOR OF CUSTOMS,
*New York.*

10560——1

By the laws of the United States the collector of customs is authorized and empowered and it is made his duty to take possession of imported articles in all cases of failure or neglect or make proper entry thereof or to pay the duties thereon and to keep the same with due and reasonable care at the charge and risk of the owner, importer, consignee, or agent, and subject at all times to their order upon payment of the proper duties and expenses.

By the laws of the United States, and particularly by the act of Congress of June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenue," the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise and as to all fees and exactions of whatever character (except duties on tonnage) is made final and conclusive against the persons interested therein, unless the owner, importer, consignee, or agent shall pay said duties or exactions under protest, whereupon an appeal lies to the board of general appraisers, whose decision thereon is final, except where an application shall be filed for a further review in the United States circuit court. The tribunals mentioned in said act of June 10, 1890, have exclusive jurisdiction of all questions as to rate and amount of duties chargeable upon imported merchandise and as to all fees and exactions thereon, and no collector or other officer of the customs is in any way liable to any importer, owner, consignee, or agent for or on account of any rulings or decision as to the classification of imported articles, or the duties charged thereon, or the collection of any dues, charges, or duties on or account thereof, or any other matter or thing as to which said owner, importer, consignee, or agent might, under said act, be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided in said act; and the district court of the United States in and for the southern district of New York, proceeding as a court of admiralty and maritime jurisdiction, has not jurisdiction thereof.

Yet Frederick W. Vanderbilt, a citizen of the State of New York, as owner of the yacht Conqueror, on the 1st day of September, 1891, filed his libel in the district court of the United States in and for the southern district of New York, proceeding as a court of admiralty and maritime jurisdiction, against the said yacht Conqueror and J. Sloan Fassett as follows:

*To the honorable the district court of the United States in and for the southern district of New York:*

The libel of Frederick W. Vanderbilt, owner of the vessel or steam yacht Conqueror, her tackle, apparel, and furniture, against all per-
4 sons intervening for their interest therein and against J. Sloat Fassett, who is now in possession thereof, in a cause of possession, civil and maritime, alleges as follows:

First. That libellant is a native-born citizen of the United States, residing in the city of New York.

Second. That said vessel was built in the year 1889, at Glasgow, Scotland; that she is a seagoing schooner-rigged screw steamship; that her length is 182.6 feet, her main breadth 24.8 feet, her depth 13.5 feet, her gross tonnage 371.91 tons, and her net tonnage 219.20; that she was designed, intended, and constructed to navigate the high seas, not in the

conveyance of passengers or merchandise for hire, but as a pleasure yacht only, and such is the only use to which she has ever been put or is intended to be put by libellant.

Third. That on or about the 7th day of May, 1891, Walter Samuel Bailey, of Kingston, upon Hull, England, then being the registered owner of said yacht, sold and delivered her to this libellant, by bill of sale, in due and usual form, and this libellant at all times since has been and now is the true and only owner thereof and of her tackle, apparel, and furniture.

Fourth. That after the purchase of said yacht libellant cruised with her in the waters of Great Britain and Norway, and upon the high seas till about the middle of June, 1891, when by direction of libellant she was navigated by her master to Halifax and thence to the United States, arriving in the port of New York on or about the 6th day of July, 1891; that said master thereupon made due entry of said vessel at said port and reported her arrival to the collector of customs of said port and delivered to said collector the manifest as prescribed by law; that said collector thereupon levied and collected on said yacht "light money" pursuant to section 4225 of the Revised Statutes of the United States; that upon arrival at said port as aforesaid the master of said yacht also presented to said collector said bill of sale for record and certification; that said collector thereupon recorded said bill of sale in his office and, having indorsed upon the original thereof the following certificate, delivered back the same so indorsed to said master, namely:

"I, Joel B. Erhardt, collector of customs for the port of New York, in the State of New York, in the United States of America, do hereby certify that the within bill of sale, bearing date of May 8th, 1891, of the foreign-built (British) yacht Conqueror, length 182.6, breadth 24.8 feet, depth 13.5 feet; that she has a figurehead and elliptic stern, one deck, and two masts; that G. W. Lyon, surveyor, has certified that she measures 237.81 tons, as follows:

| | | Tons. |
|---|---|---|
| Capacity under tonnage deck | | 346.04 |
| Break aft | | 2.17 |
| House forward | | 17.14 |
| House aft | | 4.45 |
| Chart house amid | | 2.11 |
| Gross | | 371.91 |
| Prop. power | 134.12 | |
| Crew space, 5.00 | 18.59 | |
| | | 152.71 |
| Net tonnage | | 219.20 |

5 sold and transferred by W. S. Bailey to Frederick W. Vanderbilt, is in the form and substance valid and effective in law, and has been duly recorded in my office, and the said Frederick W. Vanderbilt is a citizen of the United States. As witness my hand and seal this 13th day of July, in the year of our Lord eighteen hundred and ninety-one.

[SEAL.] "THOMAS J. DUNN,
*"Deputy Collector."*

That said bill of sale so certified is a regular document, issued from a custom-house of the United States, proving said yacht to be American property, and said yacht has carried the same ever since the recording and certifying thereof as aforesaid.

Fifth. That since prior to the 1st day of July, 1891, and to the arrival as aforesaid of said vessel in the waters of the United States, this libelant has been and now is a member of the Royal Mersey Yacht Club, and said vessel has been and now is enrolled among the yachts belonging to said yacht club; that said club is a regularly organized yacht club of a foreign nation, to wit, Great Britain, which extends, and at all times herein mentioned has extended, like privileges to the yachts of the United States, and by virtue of section 4216 of the Revised Statutes of the United States said yacht Conqueror, at all times in this paragraph mentioned, has been and now is privileged to enter and leave any port of the United States without entering or clearing at the custom-house thereof, or paying tonnage tax.

Sixth. That on the 27th day of August, 1891, in the navigable waters of the United States, in the harbor of New York off Stapleton, within the jurisdiction of this court, J. Sloat Fassett, by his deputies, agents, and servants, illegally, wrongfully, and forcibly, without the consent and against the will of this libellant, took possession of said yacht and has ever since detained her in his possession and custody and has deprived this libellant of the use and control thereof.

Seventh. That the said Fassett is, and at the times in the last paragraph mentioned was, the collector of customs of the United States for the port of New York, and he took and kept and maintained possession of said yacht solely upon the claim that she was an article imported into the United States within the fair intendment of the customs-revenue laws, and as such liable to duty; that the duties which accrued upon her importation were unpaid, and that he was entitled to take and keep her in safe custody till such duties should be paid or secured, in the manner provided by law for articles imported into the United States; that the said vessel was not seized under any claim of authority therefor given by any provision of the law of the United States relating to commerce and navigation, or of any law of the United States providing a penalty or forfeiture.

Eighth. That, as this libelant is advised and verily believes, the said yacht is not an imported article within the true intent and meaning of the tariff or customs revenue laws of the United States, and under and by virtue of those laws said Fassett, in his official capacity or otherwise, has no right or authority to take or keep possession thereof.

Ninth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Whereupon the libelant prays that process in due form of law according to the course of this honorable court in causes of admiralty and
6 maritime jurisdiction may issue against the said vessel, her tackle, apparel, and furniture, and that the said J. Sloat Fassett may be personally cited to appear and answer all the matters aforesaid, and that the said vessel, her tackle, apparel, and furniture, may be delivered to this libelant, and that the said J. Sloat Fassett may be condemned to pay

to the libelant his damages and costs in the premises, and that the libelant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

F. W. VANDERBILT.

ROOT & CLARKE,
*Libelant's Proctors and Advocates.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Frederick W. Vanderbilt, the above-named libelant, being duly sworn, says that he has read the foregoing libel and knows the contents thereof, and that the same is true according to his information and belief.

F. W. VANDERBILT.

Sworn to before me this 31st day of August, 1891.
[SEAL.] JOHN T. KIRK,
*Notary Public, Kings County, N. Y. Cert. filed in N. Y. Co.*

U. S. district court, so. dist. N. Y.

FREDERICK W. VANDERBILT,
*vs.*
YACHT CONQUEROR AND J. SLOAT FASSETT. } In admiralty.

SOUTHERN DISTRICT OF NEW YORK,
*City and County of New York, ss:*

Samuel B. Clarke being duly sworn, that he is one of the libelant's proctors herein; that the nature of this cause is shown by the sworn libel on file, a copy of which, marked with deponent's initials, is herewith presented; that the libel with libelant's stipulation for costs was filed in the clerk's office on Sept. 1, 1891, and process returnable on the 15th proximo, directing the marshal to attach the yacht and to cite respondent, Fassett, to appear, issued thereupon and placed in the hands of the marshal, who was at the time informed of the locality of said yacht, and who stated to deponent that he expected to execute the process that day.

Wherefore deponent prays:

1st. That libelant may be permitted to proceed with the cause without citing any other person to appear than said Fassett, and that the giving of notice of the pendency of the cause to all persons except said Fassett by publication or otherwise may be dispensed with;

2nd. That the marshal may be required or permitted to make return of the process in his hands at an early day to be fixed by the court;

3d. That said yacht may be released to the libelant upon such terms as to security or otherwise as to the court may seem proper;

4th. That libelant may have such other or different relief as may be proper.

SAMUEL B. CLARKE.

Subscribed and sworn to before me this 2nd day of Sept., 1891.
[SEAL.] JOHN T. KIRK,
*Notary Public, Kings County. Cert. filed in N. Y. Co.*

7 On the foregoing affidavit and on the libel and all proceedings herein:

Let the marshal and the respondent, J. Sloat Fassett, show cause before me at the U. S. court-house, New York City, on Tuesday, the 8th day of September, 1891, at 10 o'clock in the forenoon, why the prayers of said affidavit should not be granted and the libelant have such other or different relief as may be proper.

Dated Sept. 2, 1891.

CH. L. BENEDICT.

That the said yacht was not arrested by the marshal under the first process issued by the court under said libel, and an alias process was issued, returnable on the 6th day of October, 1891.

That the facts stated in the said libel do not constitute a "civil cause of admiralty and maritime jurisdiction."

At the time of the filing of said libel said yacht was in the waters of Richmond County, in the State of New York, and not within the territorial jurisdiction of the district court of the United States for the southern district of New York, but was within the territorial jurisdiction of the district court of the United States for the eastern district of New York. Said yacht so remained until the 29th day of September, 1891. On the 29th day of September, 1891, said yacht was moved by the said collector into the territorial jurisdiction of the district court of the United States in and for the southern district of New York, and placed by said collector in store under general order as follows:

OFFICE OF THE COLLECTOR OF CUSTOMS,
*Port of New York, September* 29, 1891.

SIR: The steam yacht Conqueror, an article imported from Great Britain, at this port, on the 6th day of July, 1891, not having been entered pursuant to law, and having accordingly been taken possession of by the collector of this port, agreeably to the provisions of section 2963 of the Revised Statutes of the United States, you will please take charge of the same on behalf of the said collector, placing the same in store under general order, for which purpose the Erie Basin, in southern Brooklyn, in this district, is hereby designated.

Respectfully, yours,

J. J. COUCH,
*Special Deputy Collector.*
H. W. GOURLEY,
*Naval Officer.*

GEO. W. LYON, Esq.,
*Surveyor of the Port.*

On the 29th day of September, 1891, while the said yacht was in possession of the said collector as aforesaid, the marshal for the southern district of New York placed two of his deputies by force on board of said yacht, claiming thereby to have arrested said yacht under and by virtue of the following process issued out of and by said district court of the United States, notwithstanding that the inspector of customs previously

8 on board said yacht and in charge thereof remained and still remains on board and in charge thereof as the custodian for the said collector of customs at the port of New York:

*Alias process issued under court's order.*

Date ——, 1891.

*Southern district of New York, ss:*

*The President of the United States of America to the marshal of the southern district of New York, greeting:*

Whereas a libel in rem and personam hath been filed in the district court of the United States for the southern district of New York on the 1st day of September, in the year of our Lord one thousand eight hundred and ninety-one, by Frederick W. Vanderbilt against the steam yacht Conqueror, her tackle, etc., and against J. Sloat Fassett (cause of possession in which the libelant as owner of said yacht alleges that said Fassett, under a claim of official authority as collector of customs, has illegally and wrongfully deprived him of the possession of said yacht), for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steam yacht or vessel, her tackle, etc., may be cited in general and special to answer the premises and all proceedings being had that the steam yacht or vessel, her tackle, etc., may for the causes in the said libel mentioned be delivered to the libelant.

You are therefore hereby commanded to attach the said steam yacht or vessel, her tackle, etc., and to detain the same in your custody until the further order of the court respecting the same, and to give one notice of 13 days (a shorter time than 14 days having been directed by the judge of the court) to all persons claiming the same, or knowing or having anything to say why the same should not be delivered to the libellant pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the southern district of New York, on the 6th day of October next, at 11 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf.

Witness the honorable Addison Brown, judge of said court, this 24th day of September, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and sixteenth.

SAMUEL H. LYMAN,
*Clerk.*

ROOT & CLARKE,
*Libellant's proctors.*

(Indorsed:) Vol. 37, page 274. Southern district of New York, United States district court. Frederick W. Vanderbilt against the steam yacht Conquerer, her tackle, etc., and against J. Sloat Fassett. Process in rem and personam. Returnable Oct. 6th, 1891. Root & Clarke, proctors for libellant. Filed. Let within process issue Sept. 23, 1891. Charles L. Benedict.

9 That the order to issue said process should not have been granted, the said yacht being at the time property taken and detained by said collector under authority of the revenue laws of the United States, and then being in the custody of the law.

Wherefore the said J. Sloat Fassett, collector, respectfully requests and prays remedy by writ of prohibition to be issued out of this honorable court to the judge of the district court of the United States in and for the southern district of New York, proceeding as a court of admiralty and maritime jurisdiction, to be directed to prohibit him from holding the plea aforesaid anywise further before him.

J. J. COUCH,
*Spl. Dy. Collector.*

Joseph J. Couch, special deputy collector of customs, and by law acting collector of customs of the port and collection district of New York, in the absence of the collector for said port and district, so constituted under his hand and seal, being duly sworn, saith that the facts stated in the foregoing suggestion are true.

J. J. COUCH.

Sworn to before me this 2d day of October, 1891.

P. J. ROON,
*Notary Public, N. Y. Co.*

10 Supreme Court of the United States.

No. 10, original. October term, 1891.

Ex parte: In the matter of Jacob Sloat Fassett, late collector of customs of the port of New York, petitioner. On petition for a writ of of prohibition.

On consideration of the petition of Jacob Sloat Fassett, late collector of customs of the port of New York, it is now here ordered by the court that cause be shown by the judge of the district court of the United States for the southern district of New York before this court, at Washington, on the second day of November next, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of prohibition should not be granted as prayed in said petition.

OCTOBER 19, 1891.

11 Supreme Court of the United States.

I, James H. McKenney, clerk of the Supreme Court of the United States, do hereby certify that the foregoing are true copies of the petition for a writ of prohibition and the rule to show cause granted thereon, in the case entitled Ex parte: In the matter of Jacob Sloat Fassett, late collector of customs of the port of New York, petitioner, No. 10, org'l, October term, 1891, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the city of Washington, this 26th day of October, A. D. 1891.

[SEAL.] JAMES H. MCKENNEY,
*Clerk of the Supreme Court of the United States.*

12 *To the honorable the Justices of the Supreme Court of the United States:*

In compliance with the order to show cause, of which a certified copy is annexed hereto, the undersigned, United States district judge for the southern district of New York, respectfully returns and certifies as follows:

1. That from the 1st day of September to the 3rd of October, 1891, the undersigned was absent from the southern district of New York, and that during that interval the Hon. Charles L. Benedict, judge of the eastern district of New York, acted pursuant to law as judge of the district court for the southern district of New York.

2. That annexed hereto is a certified copy of all the record and proceedings in this court in the case referred to in said order to show cause up to this date, including the libel, the three several processes issued to the United States marshal, with his returns thereto; the orders made by this court for the issuing of the second and third processes to the said marshal; the affidavits filed by the U. S. attorney in behalf of the collector; the appearance filed by the U. S. attorney and the answers and exceptions filed in behalf of the collector of this port and of the late collector; and the endorsements upon the said various papers showing
13 the time of the filling thereof in the office of the clerk of this court.

3. That on the 6th day of October, 1891, upon the call before me of the second process issued to the marshal in said cause, and on his return made to the said process, the U. S. attorney appeared specially for the collector of the port and moved that no further proceeding be taken in the cause, on the ground that the action being a possessory action only, for the recovery of the possession of a ship, the court should not proceed further therein without obtaining the control of the vessel, and that the court had no lawful power or jurisdiction to take such control; that the return of the marshal to the last-named process did not show that the ship was in his custody; but if the return so imported, then that the return was false; and leave was asked to file affidavits traversing the marshal's return; and the parties being heard on said motion, leave was granted the U. S. attorney to file such affidavits; and leave was also given to the marshal to file amendments to his return, stating additional facts, if desired; and the matter being for that purpose further adjourned from day to day until the 8th day of October, 1891, the annexed ten affidavits were filed on that day; and no further return being made by the marshal, and it appearing that the marshal was not in the actual and undisputed control of said yacht, and considering that an alias process had pre-
14 viously been ordered by the court on application therefor before the Hon. Charles L. Benedict, and considering that the yacht, having come into port in the ordinary course of navigation and not as merchandise upon any other ship, was not prima facie, and upon all the papers before me, an "imported article" within the meaning of the act of Congress approved October 1, 1890, nor prima facie subject to customs duties, and that prima facie the collector had no authority in law to take or to detain the said vessel for duties, the court thereupon on application of the libellant's proctors made the order for a third process to the marshal,

dated October 8, 1891, hereto annexed, to the end that the legal rights of the respective parties might be determined in the ordinary and regular course of judicial procedure in admiralty.

That to the last-named process, the marshal, on October 1, 1891, returned that he had taken exclusive possession of said yacht; on the same day the U. S. attorney entered an appearance for the collector and late collector of this port; and on the 15th day of October, 1891, their answers and exceptions to the libel were filed, of which copies are annexed.

And thereupon it is respectfully submitted whether or not this court should take further proceedings in the said cause.

Witness my hand this 29th day of October, 1891.

ADDISON BROWN,
*U. S. Dist. Judge.*

15 U. S. district court, so. dist. N. Y.

FREDERICK W. VANDERBILT
*vs.*
YACHT CONQUEROR & J. SLOAT FASSETT. } In admiralty.

SOUTH. DISTRICT OF NEW YORK,
*City & County of New York, ss:*

Samuel B. Clarke being duly sworn, that he is one of the libellant's proctors herein; that the nature of this cause is shown by the sworn libel on file, a copy of which, marked with deponent's initials, is herewith presented; that the libel, with libellant's stipulation for costs, was filed in the clerk's office on Sept. 1, 1891, and process returnable on the 15th proximo directing the marshal to attach the yacht and to cite respondent Fassett to appear, issued thereupon and placed in the hands of the marshal, who was at the time informed of the locality of said yacht, and who stated to deponent that he expected to execute the process that day.

Wherefore deponent prays:

1st. That libellant may be permitted to proceed with the cause
16 without citing any other person to appear than said Fassett, and that the giving of notice of the pendency of the cause to all persons except said Fassett by publication or otherwise may be dispensed with.

2d. That the marshal may be required or permitted to make return of the process in his hands at an early day to be fixed by the court.

3d. That said yacht may be released to the libellant upon such terms as to security or otherwise as to the court may seem proper.

4th. That libellant may have such other or different relief as may be proper.

SAMUEL B. CLARKE.

Subscribed and sworn to before me this 2d day of Sept., 1891.
[SEAL.] JOHN T. KIRK,
*Notary Public, Kings County. Cert. filed in N. Y. Co.*

On the foregoing affidavit and on the libel and all proceedings herein: Let the marshal and the respondent, J. Sloat Fassett, show cause before me at the U. S. court-house, New York City, on Tuesday, the 8th day of

September, 1891, at 10 o'clock in the forenoon, why the prayers of said affidavit should not be granted and the libellant furnish other or different relief as may be proper.

Dated Sept. 2, 1891.

CHAS. L. BENEDICT.

17 (Indorsed:) Service of copy of within affidavit & order to show cause is admitted the 2d day of Sept., 1891. J. S. Fassett, collector, by D. F. Phertes, depy. collector. Served copy on marshal and U. S. dist. atty., Sept. 2, '91. R. H.

U. S. district court, so. dist. N. Y. In admiralty. Frederick W. Vanderbilt vs. yacht Conqueror and J. Sloat Fassett. Affi. & order to show cause. Root & Clarke, libellant's proctors, 32 Nassau st., N. Y. City.

18 District court of the United States for the southern district of New York.

FREDERICK W. VANDERBILT
*against*
YACHT "CONQUEROR" AND J. SLOAT FASSETT.

I, Charles L. Benedict, judge of the district court of the United States for the eastern district of New York, and, in respect of the matters hereinafter mentioned, acting, pursuant to section 600 of the Revised Statutes of the United States, as district judge for the southern district of New York, certify as follows:

I.

That upon the affidavit hereto annexed, of one of the proctors for the libellant in this case, I made the order to show cause which is hereto attached; that upon the 8th day of September, 1891, said order to show cause came on for hearing before me, and was partially argued by the advocate for the libellant and by the district attorney in opposition, when the attention of the court being called to the fact that no return of the process had been made by the marshal, the matter of said order to show cause was postponed indefinitely, and was not thereafter renewed before me. That on September 15, 1891, it appearing by the return made
19 by the marshal to the original process issued in this case that the marshal had made no seizure of the vessel, the proctors for the libellant moved in open court, the district attorney being then present, for an alias process; that, the district attorney then stating that he appeared specially for the collector of customs to oppose said motion, said motion was argued by the advocate for the libellant and by the district attorney in opposition orally and upon briefs, and after consideration I made the order appearing on file for the issuance of alias process and for the publication of notice of the suit.

Witness my hand this 26 day of October, 1891.

CHAS. L. BENEDICT.

20 (Indorsed:) District court of the U. S. for the southern district of New York. Frederick W. Vanderbilt ag'st Yacht Conqueror and J. Sloat Fassett. Certificate of Judge Benedict, with original order to show cause on the subject of releasing the yacht on security.

21 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the writings annexed to this certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this thirtieth day of October, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the said United States the one hundred and sixteenth.

[SEAL.] SAM'L H. LYMAN,
*Clerk.*

22 *To the honorable the district court of the United States, in and for the southern district of New York:*

The libel of Frederick W. Vanderbilt, owner of the vessel or steam yacht "Conqueror," her tackle, apparel, and furniture, against said yacht and against all persons intervening for their interest therein and against J. Sloat Fassett, who is now in possession thereof, in a cause of possession, civil and maritime, alleges as follows:

First. That libellant is a native-born citizen of the United States residing in the city of New York.

Second. That said vessel was built in the year 1889, at Glasgow, Scotland; that she is a sea-going, schooner-rigged screw steamship; that her length is $182\frac{6}{10}$ feet, her main breadth $24\frac{8}{10}$ feet, her depth $13\frac{5}{10}$ feet, her gross tonnage $371\frac{91}{100}$ tons, and her net tonnage $219\frac{20}{100}$; that she was designed, intended, and constructed to navigate the high sea, not in the conveyance of passengers or merchandise for hire, but as a pleasure yacht only, and such is the only use to which she has ever been put or is intended to be put by libelant.

Third. That on or about the 7th day of May, 1891, Walter Samuel Bailey, of Kingston upon Hull, England, then being the registered owner of said yacht, sold and delivered her to this libelant by bill of sale in due and usual form, and this libelant at all times since has been and now
23 is the true and only owner thereof, and of her tackle, apparel, and furniture.

Fourth. That after the purchase of said yacht libelant cruised with her in the waters of Great Britain and Norway and upon the high seas till about the middle of June, 1891, when by direction of libelant she was navigated by her master to Halifax and thence to the United States, arriving in the port of New York on or about the 6th day of July, 1891; that said master thereupon made due entry of said vessel at said port, and reported her arrival to the collector of customs of said port, and delivered to said collector the manifest as prescribed by law; that said collector thereupon levied and collected on said yacht "light money," pursuant to section 4225 of the Revised Statutes of the United States; that upon arrival at said port as aforesaid the master of said yacht also presented to said collector said bill of sale for record and certification; that said collector thereupon recorded said bill of sale in his office, and having en-

dorsed upon the original thereof the following certificate, delivered back the same so endorsed to said master, namely:

"I, Joel B. Erhardt, collector of customs for the port of New York, in the State of New York, in the United States of America, do hereby certify that the within bill of sale, bearing date of May 8th, 1891, of the foreign-built (British) yacht 'Conqueror,' length, $182\frac{6}{10}$ feet; breadth, $24\frac{8}{10}$ feet; depth, $13\frac{5}{10}$ feet; that she has a figurehead and elliptic stern, one deck and two masts; that G. W. Lyon, surveyor, has certified that she measures $237\frac{81}{100}$ tons, as follows:

| | | | |
|---|---|---|---|
| Capacity under tonnage deck | | 346.04 | tons. |
| Break aft | | 2.17 | " |
| House forward | | 17.14 | " |
| " aft | | 4.45 | " |
| Chart-house, amid | | 2.11 | " |
| | | 371.91 | " gross. |
| 24 Propelling power | 134.12 | | |
| Crew space, $\frac{5}{100}$ | 18.59 | | |
| | 152.71 | | |
| | | 219.20 | net tonnage. |

Sold and transferred by W. S. Bailey to Frederick W. Vanderbilt is in the form and substance valid and effective in law, and has been duly recorded in my office; and the said Frederick W. Vanderbilt is a citizen of the United States. As witness my hand and seal this 13th day of July, in the year of our Lord eighteen hundred and ninety-one.

[SEAL.] THOMAS J. DUNN,
*Deputy Collector.*

That said bill of sale so certified is a regular document issued from a custom-house of the United States, proving said yacht to be American property; and said yacht has carried the same ever since the recording and certifying thereof as aforesaid.

Fifth. That since prior to the 1st day of July, 1891, and to the arrival as aforesaid of said vessel in the waters of the United States, this libelant has been and now is a member of the Royal Mersey Yacht Club, and said vessel has been and now is enrolled among the yachts belonging to said yacht club; that said club is a regularly organized yacht club of a foreign nation, to wit, Great Britain, which extends and at all times herein mentioned has extended like privileges to the yachts of the United States, and by virtue of section 4216 of the Revised Statutes of the United States said
25 yacht "Conqueror" at all times in this paragraph mentioned has been and now is privileged to enter and leave any port of the United States without entering or clearing at the custom-house thereof or paying tonnage tax.

Sixth. That on the 27th day of August, 1891, in the navigable waters of the United States, in the harbor of New York, off Stapleton, within the jurisdiction of this court, J. Sloat Fassett, by his deputies, agents, and servants, illegally, wrongfully, and forcibly, without the consent and against the will of this libelant, took possession of said yacht and has ever since detained her in his possession and custody, and has deprived this libelant of the use and control thereof.

Seventh. That the said Fassett is and at the times in the last paragraph mentioned was the collector of customs of the United States for the port

of New York, and he took and kept and maintains possession of said yacht solely upon the claim that she was an article imported into the United States within the fair intendment of the customs revenue laws and as such liable to duty; that the duties which accrued upon her importation were unpaid, and that he was entitled to take and keep her in safe custody till such duties should be paid or secured in the manner provided by law for articles imported into the United States; that the said vessel was not seized under any claim of authority therefor given by any provision of the laws of the United States relating to commerce and navigation or of any law of the United States providing a penalty or forfeiture.

Eighth. That, as this libelant is advised and verily believes, the
26 said yacht is not an imported article within the true intent and meaning of the tariff or customs revenue laws of the United States, and under and by virtue of those laws said Fassett in his official capacity or otherwise has no right or authority to take or keep possession thereof.

Ninth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Whereupon the libelant prays that process in due form of law, according to the course of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said vessel, her tackle, apparel, and furniture, and that the said J. Sloat Fassett may be personally cited to appear and answer all the matters aforesaid, and that the said vessel, her tackle, apparel, and furniture, may be delivered to this libelant, and that the said J. Sloat Fassett may be condemned to pay to the libelant his damages and costs in the premises, and that the libelant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

F. W. VANDERBILT.

ROOT & CLARKE,
*Libellant's Proctors and Advocates.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Frederick W. Vanderbilt, the above-named libelant, being duly sworn, says that he has read the foregoing libel and knows the contents thereof, and that the same is true according to his information and belief.

F. W. VANDERBILT.

27 Sworn to before me this 31st day of August, 1891.

[SEAL.] JOHN T. KIRK,
*Notary Public, Kings County, N. Y., Cert. filed in N. Y. Co.*

(Endorsed:) Filed Sept. 1, 1891.

28 District court of the United States for the southern district of New York.

Filed and recorded the 1st day of Sept., 1891.

*Stipulation for libellant's costs entered into pursuant to the rules and practices of this court.*

Whereas a libel was filed in this court on the first day of September, in the year of our Lord one thousand eight hundred and ninety-one, by

Frederick W. Vanderbilt against the steam yacht "Conqueror," etc., for the reasons and causes in the said libel mentioned and praying that said the steam yacht "Conquerer" may be delivered to the libellant, &c., and the said libellant and Edward H. Wales, surety parties hereto, hereby consenting and agreeing and that in case of default or contumacy on the part of the libellant or said surety execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned that the libellant above named shall appear and answer to the cause and interrogatories, and shall pay all costs as shall be awarded against him by this court, or in case of appeal by the appellate court.

F. W. VANDERBILT,
EDWARD H. WALES.

Taken and acknowledged this first day of September, 1891, before me.
[SEAL.] JOHN T. KIRK.
*Notary Public, Kings County, N. Y., cert. filed in N. Y. County.*

*Southern District of New York, ss:*

Frederick W. Vanderbilt and Edward H. Wales, parties to the above stipulation, being duly sworn, do depose and say that they reside in the city of New York, and that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

F. W. VANDERBILT,
EDWARD H. WALES.

Sworn to this first day of September, 1891, before me.
[SEAL.] JOHN T. KIRK,
*Notary Public, Kings County, N. Y., cert. filed in N. Y. Co.*

29 STATE OF NEW YORK,
*City and County of New York, ss:*

Thomas Mulhearn, of the city of New York, being duly sworn, says he is chief clerk in the office of the Mail and Express, a daily paper printed and published in the city of New York, and that the notice, of which the annexed is a printed copy, has been regularly published in the said Mail and Express for twelve times successively, commencing on the 1st day of September, 1891.

THOMAS MULHEARN.

Sworn before me this 15th day of September, 1891.
WM. R. WORRALL,
*Notary Public, No. 70, City and County of New York.*

30 UNITED STATES DISTRICT COURT,
*Southern District of New York:*

NOTICE.—I have arrested the steam yacht "Conqueror," her tackle, etc., impleaded, &c., libeled by Frederick W. Vanderbilt, for possession; process returnable and cause to be heard September 15, 1891, 11 a. m., in said

court, post-office building, New York City. All persons interested must then present their claims or be defaulted, and said vessel delivered up in pursuance of the said libel.

New York, Sept. 1, 1891.

JOHN W. JACOBUS,
*U. S. Marshal.*

ROOT & CLARKE,
*Libellant's Proctor.*

31 [U. S. marshal's office, southern district of New York, room 56, 3d floor, U. S. court and P. O. building.]

NEW YORK, *September* 1, 1891.

SIR: You will please to take notice that the steam yacht Conqueror (impleaded with J. Sloat Fassett), her tackle, etc., has been attached by me, at the suit of Frederick W. Vanderbilt, for possession, and will remain in my custody until the claim is settled or the said vessel is bonded.

Yours, etc.,

[SEAL.] (Signed) JOHN W. JACOBUS,
*U. S. Marshal, Southern District, N. Y.*

To the captain or person in charge of said steam yacht.

32 I do hereby certify that upon the receipt of the annexed process my deputy proceeded to execute the same, and on the 2nd day of September, 1891, found the within-named steam yacht "Conqueror" (her tackle, &c.) at anchor in New York Bay, off of Stapleton, Staten Island, and served a notice of attachment of such yacht, a copy of which notice is hereto annexed, marked A, upon Charles N. Unsworth, first officer of said yacht, the captain thereof being absent. On the 4th day of September inst. I caused the said notice of attachment to be affixed to the main mast of said yacht, and every day since that day until the 11th day of September, inst., my deputy went on board of said yacht, and at all times found an inspector of customs on board. On the day last above mentioned, on my deputy attempting to board said yacht he was forbidden to do so by the inspector of customs, the latter claiming to be in charge thereof for the United States.

That after the receipt of said process I caused to be published the notice affixed to the proof of publication hereto annexed, marked B, and that said notice has been published every day since, as appears by said proof.

That the Government of the United States claim that there are duties payable on said vessel, and that she was at the time of issuing process herein, and that ever since has been, in possession of the United States, and that the United States is entitled to hold her until such duties

33 are paid, and I further return that the libel herein sets up such claim of the United States.

I further certify that on the 2nd day of September, 1891, in the city of New York, in my district, I personally served the within process upon the within-named respondent, J. Sloat Fassett, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

JOHN W. JACOBUS,
*U. S. Marshal.*

NEW YORK, *September* 15, 1891.

34 SOUTHERN DISTRICT OF NEW YORK, *ss:*

The President of the United States of America to the marshal of the southern district of New York, greeting: Whereas a libel in rem and personam hath been filed in the district court of the United States, for the southern district of New York, on the 1st day of Sept., in the year of our Lord one thousand eight hundred and ninety-one, by Frederick W. Vanderbilt vs. The steam yacht "Conqueror," her tackle, &c., and against J. Sloat Fassett (possession), for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steam yacht or vessel, her tackle, &c., may be cited, in general and special, to answer the premises, and all proceedings being had that the said steam yacht or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be delivered to the libellant.

You are therefore hereby commanded to attach the said steam yacht or vessel, her tackle, &c., and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be delivered to the libelant pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the southern district of New York, on the 15th day of September, 1891, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And we do hereby further empower, and strictly charge and command you, the said marshal, that you cite and admonish the said respondent, if he shall be found in your district, that he be and appear before the said district court on the 15th day of Sept., 1891, at the U. S. court rooms in the city of New York, then and there to answer the said libel, and to make his allegations in that behalf; and have you then and there this writ, with your return thereon.

Witness the honorable Addison Brown, judge of said court, this 1st day of September, in the year of our Lord one thousand eight hundred and ninety-one, and of our independence the one hundred and sixteenth.

[SEAL.] SAM'L H. LYMAN,
*Clerk.*

ROOT & CLARK,
*Libellant's Proctors.*

35 (Indorsed:) Vol. 37, page 274. Southern district of New York, United States district court. Frederick W. Vanderbilt vs. The steam yacht "Conqueror," her tackle, &c., and against J. Sloat Fassett. Process in rem and personam. Ret'ble Sept. 15th, 1891. Root & Clarke, proctors for libellant. Filed Sept. 15th, 1891. I hereby depute Charles H. Jacobus to execute the within process. Dated September 1, 1891. John W. Jacobus, U. S. marshal.

In obedience to the within monition, I attach the herein described on the of , and have given due notice to all persons claiming the same that this court will, on the day of inst.

(if that day shall be a day of jurisdiction; if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same. , U. S. marshal. Dated , 188 .

36 United States district court, southern district of New York.

FREDERICK W. VANDERBILT
*vs.*
THE STEAM YACHT "CONQUEROR," HER tackle, &c. } In admiralty.

STATE OF NEW YORK,
*City and County of New York, ss:*

I, Joseph J. Couch, special deputy collector of customs, and by law acting collector of customs of the port of New York in the absence of the collector for said port so constituted under his hand and seal, being duly sworn, saith that the steam yacht "Conqueror" was, on the 27th day of August, 1891, taken possession of, and is now detained by me, under authority of the revenue laws of the United States, and for the enforcement of the payment of the duties chargeable thereon, also by direction of the Secretary of the Treasury of the said United States, pursuant to his decision construing the law in this regard; that the said yacht has been continuously since the said date in my possession.

I further declare that I have not given permission to the United States marshal for this judicial district, his deputy, or to any person to make seizure of said property, or to enter thereon for such purpose.

J. J. COUCH.

37 Sworn to and subscribed before me this 10th day of September, 1891.

[SEAL.] THEO. B. MOORE,
*Not. Public.*

Filed Sept. 23, 1891.

38 United States district court, southern district of New York.

FREDERICK W. VANDERBILT
*vs.*
THE YACHT "CONQUEROR," &C. } In admiralty.

I, Peter T. O'Neill, being duly sworn, saith, I am an inspector of customs; that on the second of September, 1891, about eight o'clock in the morning, I entered upon and took charge of the said steam yacht "Conqueror" (relieving Inspector Richard Barry), for and on the authority of the collector of customs for the port and collection district of New York, which said yacht was and has since been at anchor off Stapleton, Staten Island, in the harbor and port of New York aforesaid; that the said yacht under the said authority has been in my actual charge during the day since that date, and at night in charge of the night inspector of customs; that on that day, and at day's intervals during the time aforesaid, a person, who I afterwards learned was the United States marshal, came from the shore

and boarded the said yacht, and at one of his visits, in my absence, while the vessel was in charge of the night inspector, as he informed me, posted a notice on the vessel's mast informing all concerned of the pendency of the libel aforesaid, which said notice was so posted surreptitiously or without my knowledge or any assent on my part; that on a subsequent visit
39 the said deputy marshal or person so representing himself, I informed him that I held the vessel in charge for and on behalf of the collector of customs of the port aforesaid and would not recognize any authority in him in any respect with reference to the said vessel unless by direction of my superior officer; that the said deputy did not take or exercise, or attempt to take or exercise, any direction, possession, or custody of the said vessel; that I remained on board with full, absolute custody of the same, while he was on board—which was but for a short interval at any time—and after his departure; that I have continued to hold said possession and custody as aforesaid, except at such times as I have been relieved by another officer of customs under the proper authority, so that at no time since the date aforesaid has the said vessel been out of the actual custody and control of an authorized officer of the customs, under and by virtue of the revenue laws of the United States.

I further saith that I have in no sense recognized or assented to any possession or control of the said vessel by the United States marshal, his deputy, or any other person than the collector of customs of the port aforesaid.

PETER T. O'NEILL.

Sworn to and subscribed this 14th day of September, 1891.

[SEAL.] WALTER R. EATON,

*Notary Public, Kings County, certificate filed in N. Y. Co.*

(Endorsed:) Filed Sept. 23, 1891.

40 District court of the United States for the southern district of New York.

FREDERICK W. VANDERBILT
*against*
YACHT CONQUEROR, &C., AND J. SLOAT FASSETT.

On the application of Root & Clarke, proctors for the libellant,

It is ordered, that an alias process for the attachment of said yacht, her tackle, &c., issue,

Dated New York, September 23, 1891.

CHAS. L. BENEDICT.

(Endorsed:) Filed Sept. 24, 1891.

41 United States district court, southern district of New York.

NOTICE.—I have arrested the yacht Conqueror, her tackle, etc., impleaded with J. Sloat Fassett, libelled by Frederick W. Vanderbilt, for possession. Process returnable and cause to be heard October 6, 1891, at

11 a. m., in said court, United States court and post-office building, New York City. All persons interested must then present their claims, or be defaulted, and said vessel condemned.

New York, September 30, 1891.

JOHN W. JACOBUS,
*U. S. Marshal.*

ROOT & CLARK,
*Libellant's Proctors.*

42 STATE OF NEW YORK,
*City and County of New York, ss:*

Thomas Mulhearn, of the city of New York, being duly sworn, says he is chief clerk in the office of the Mail and Express, a daily paper printed and published in the city of New York; and that the notice of which the annexed is a printed copy has been regularly published in the said Mail and Express for five times successively, commencing on the 30th day of September, 1891.

THOMAS MULHEARN.

Sworn before me this 5th day of October, 1891.

ROBERT C. ALEXANDER,
*Notary Public, City and County of New York.*

43 At a stated term of the district court of the United States of America, for the southern district of New York, held at the United States court rooms, in the city of New York, on the 30th day of Sept., in the year of our Lord one thousand eight hundred and ninety-one.

Present: The honorable Charles L. Benedict, district judge.

FREDERICK W. VANDERBILT
*vs.*
THE YACHT CONQUEROR, &c.

On motion of Root & Clark, proctors for the libellant, it is ordered that the notice for all persons to appear and intervene, for their interest in the above-entitled cause, be published by the marshal until the sixth day of October, 1891.

CHAS. L. BENEDICT.

(Endorsed:) Filed 30th day of Sept., 1891.

44 *Alias process issued under court's orders, dated* 1891.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The President of the United States of America to the marshal of the southern district of New York, greeting:

Whereas a libel in rem and personam hath been filed in the district court of the United States for the southern district of New York on the 1st day of September, in the year of our Lord one thousand eight hun-

dred ninety-one, by Frederick W. Vanderbilt against the steam yacht "Conqueror," her tackle, &c., and against J. Sloat Fassett. (Cause of possession, in which the libellant as owner of said yacht alleges that said Fassett, under a claim of official authority, as collector of customs, has illegally and wrongfully deprived him of the possession of said yacht) for the reason and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steam yacht or vessel, her tackle, &c., may be cited in general and special to answer the premises and all proceedings being had that the said steam yacht or vessel, her tackle, &c., may
45 for the causes in the said libel mentioned be delivered to the libellant.

You are therefore hereby commanded to attach the said steam yacht or vessel, her tackle, &c, and to detain the same in your custody until the further order of the court respecting the same, and to give due notice of 13 days (a shorter time than 14 days having been directed by the judge of the court) to all persons claiming the same or knowing or having anything to say why the same should not be delivered to the libellant pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the southern district of New York, on the 6 day of October next, at 11 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf.

Witness the honorable Addison Brown, judge of said court, this 24th day of September, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and sixteenth.

[SEAL.] SAM'L H. LYMAN,
*Clerk.*

ROOT & CLARK,
*Libellants' Proctors.*

(Endorsed:) Filed Oct. 6, 1891.

Let the within process issue.
Sept. 3, 1891.

CHAS. L. BENEDICT.

46 (Endorsed:) In obedience to the within monition I attached the steam yacht Conqueror, her tackle, &c., therein described on the 29th day of September, 1891, and have given due notice, in obedience to the annexed order, to all persons claiming the same, that this court will, on the 6th day of October inst. (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

Proof of publication of notice hereto annexed.

JOHN W. JACOBUS,
*U. S. Marshall.*

Dated October 6th, 1891.

I hereby depute John E. Dowley to execute the within process.

JOHN W. JACOBUS,
*U. S. Marshal, S. D. N. Y.*

NEW YORK, *September* 24, 1891.

47 U. S. district court southern district of New York.

FREDERICK W. VANDERBILT
*vs.*
THE YACHT "CONQUEROR," } In admiralty.

STATE AND COUNTY OF NEW YORK, *ss:*

I, Francis Hendricks, being sworn, saith that I am the collector of customs for the port and collection district of New York.

On the 1st of October, 1891, as the successor in office aforesaid of J. Sloat Fassett, I took possession of the steam yacht "Conqueror," lying in store under general order, in the Erie Basin, South Brooklyn, within the said collection district. I so took and now hold possession of the said yacht, under and by authority of the revenue laws of the United States, for the payment of duties upon the same as an article imported into the United States, the same not having been entered in pursuance of the provisions of any act regulating imports.

I further declare that I have not, nor has anyone in my behalf nor to my knowledge, given permission to the United States marshal of this judicial district or his deputy or to any person to enter upon the said yacht, save and excepting the duly authority customs officer or inspector of customs, or to make seizure or to take custody or control in any manner of the said yacht, or to do any act inconsistent with my right and the right of the United States to absolute possession for the payment of customs duties as aforesaid.

FRANCIS HENDRICKS.

D. F. P.

48 Subscribed and sworn to before me this 6th day of October, 1891, at 4 p. m.

[SEAL.] J. GANTIER, JR.,
*Notary Public, N. Y. Co.*

(Endorsed:) Filed Oct. 8, 1891.

49 U. S. district court southern district of New York.

FREDERICK W. VANDERBILT,
*vs.*
THE YACHT "CONQUEROR." } In admiralty.

STATE AND COUNTY OF NEW YORK, *ss:*

I, Joseph J. Couch, being duly sworn, saith that I was on the 27th of August, 1891, have been since continuously and now am, the special deputy collector of customs for the port and collection district of New York, so constituted in due form of law, under the hands and seals, respectively, of J. Sloat Fassett, collector of customs for that collection district, on that day and until the 1st of October, 1891, and of Francis Hendricks, collector, as aforesaid, on the day last named, any at the present time.

On the 27th of August, 1891, aforesaid, the steam yacht "Conqueror" was taken possession of by the said J. Sloat Fassett, collector, as aforesaid, under authority of the customs revenue laws of the United States,

and, further, by the direction of the Secretary of the Treasury of the United States, the said yacht having been imported into the United States, and not having been entered in pursuance of any act regulating importation.

On the 1st of October, aforesaid, the possession of the said yacht devolved upon and was taken by the said Francis Hendricks, collector of customs, as the duly appointed and qualified successor of the said J. Sloat
50 Fassett, and is now held by the said Francis Hendricks, as collector, under authority of the revenue laws of the United States. At the time of taking possession of the said yacht, as aforesaid, to wit, on the 27th of August, 1891, the same was lying at anchor off Stapleton, Staten Island, within the boundary of the county of Richmond, in the State of New York, within the jurisdiction of the port and collection district aforesaid, where she continued to lie at anchor on and during the 1st of September following and until the 29th of September, 1891, at which last-named date, for greater security and pursuant to instructions of the Secretary of the Treasury, she was removed by the collector of the said port to the Erie Basin, South Brooklyn, in the said collection district, under the personal attendance, charge, and control, for the collector aforesaid, by the inspector of customs, such an officer remaining on board and in absolute control during such removal, at her arrival, and during her detention at her said place of harborage.

I further declare that the said yacht has been continuously, since the 27th of August down to the present moment, and is at present in the possession of the collector of customs aforesaid, and of the law regulating importations; that I have not, nor has anyone by my authority, or by the authority of the collector of customs, given permission to the United States marshal for this judicial district, his deputy, or any person whomsoever, at any time, to enter thereon, save and excepting the duly authorized cus-
toms officer or inspector, or to make seizure, or to take custody or
51 control in any manner of the said yacht, or to board the same for such purpose or any other purpose inconsistent with the possession and custody aforesaid, and with the right of the collector of this port and the right of the United States to hold the same for the payment of customs duty as aforesaid.

J. J. COUCH.

Sworn to and subscribed before me this 6th day of October, 1891, at 4 p. m.

[SEAL.] J. GANTIER, JR.,
*Notary Public, N. Y. Co.*

(Endorsed:) Filed Oct. 8, 1891.

52 STATE OF NEW YORK,
*City and Co. of N. York:*

Peter T. O'Neill, being duly sworn, saith that he is an inspector of customs at the port of New York; that on the 29th of September, 1891, he was in charge of the yacht Conqueror, stationed off Stapleton, Staten Island, for and under direction of the collector of customs of that port; that upon the said yacht being removed that day by direction of the said collector, and by a steam tug directed by an inspector of customs, he remained on board the said yacht and continued to remain in charge thereof

after her removal to the Erie basin, where she was tied up about half past two o'clock afternoon; that at ten minutes after four o'clock thereafter, two men appeared on the side of the vessel, representing themselves as deputy United States marshals, and attempted to serve a paper, which they said was for the purpose of attaching the yacht; that at this juncture deponent appeared at the gangway and attempted to prevent them coming aboard, laying his hands on the foremost; the other then jumped on board and the first also, both against deponent's earnest protest and declaration that he held the vessel for the collector of the port, and under his instructions to resist any interference with his possession; that they persisted in remaining on board against deponent's remonstrance, and with such appearance of force as he was unable successfully to encounter; that he told them he should remain on board in charge, to which they offered no objection; that he
53 accordingly so remained in charge until about 4:55 o'clock afternoon of that day, when he was relieved by Night Inspector Kasmyre, who in turn he relieved at half past seven in the morning of the 30th of September, when he was temporarily relieved at a later hour for the purpose of making a report at the custom-house. He further saith that about four (p. m.) o'clock on said 30th of September he resumed his charge of the said vessel; that each day excepting Sunday, and up to this morning since, he has taken charge of the same, at or about seven o'clock in the forenoon, relieving at such hour the night inspector whom he found in charge and control; and on Sunday he was relieved by a day inspector on board. During the entire time he has been so in charge on board the said vessel, no assertion of custody or control was made by deputy marshal, nor was any attempt made by him or any other person to interfere with deponent's control of the yacht, further than the declaration at the beginning that the U. S. marshal was in possession, which deponent earnestly antagonized by the assertion of the collector's custody held through him as the legally authorized customs officer.

PETER T. O'NEILL.

Sworn to and subscribed this 6th day of October, 1891,
[SEAL.] WM. MASTEN,
*Notary Public, Kings County, N. Y.*
*Certificate filed in New York County.*

54 STATE OF NEW YORK,
*City & Co. of N. York:*

I, Benjamin F. Kasmire, being sworn, saith that I am an inspector of customs in the service of the United States at the port of New York. On the 29th of September, 1891, about 4 o'clock afternoon, for and on behalf of the collector of customs for that port, and by proper official designation, I went on board and took charge of the steam yacht Conqueror, lying in Erie basin, South Brooklyn, thereby relieving the day inspector, Mr. Peter T. O'Neill. At or about six o'clock each alternate night, to wit, October 1st, 3rd, and 5th, I also, by the same authority and in the same capacity as night inspector of customs, boarded the said yacht, thereby relieving the day inspector, whom I found on board and in charge. I remained continuously so on board and in charge until about half past seven in the morning of the following days, when I was relieved by the day inspector, who came aboard, taking my place. During the entire time mentioned I had

absolute and entire control of the yacht and possessions thereof as and for the collector of customs, and so considered that to be my relation to the vessel. During this time no assertion of custody, control, or possession was made by any marshal, deputy marshal, or other person, nor was any attempt or offer made by any such officer or person to interfere with my coming aboard, remaining there, or to interfere in any way with my
55 charge and control, which was well known and understood by all persons aboard the vessel to be that of the collector of customs.

BENJ. F. KASMIRE,
*Night Inspector of Customs.*

Sworn to and subscribed before me this 6th day of October, 1891.
[SEAL.] C. H. HEYZER,
*Notary Public, N. Y. Co.*

56 STATE OF NEW YORK,
*City and Co. of N. York, ss:*

I, Joseph Wallace, being sworn, saith that I am a United States inspector of customs at the port of New York. On the 30th of September, 1891, by authority of the collector of customs at that port, at or about five o'clock and thirty minutes afternoon, I went on board and took charge, in his name, of the steam yacht Conqueror, lying in Erie basin, South Brooklyn, thereby relieving Mr. Peter O'Neill, the day inspector, also on board and in charge. On each alternate day following, to wit, October 2nd and 4th, at or about the same time in the afternoon and in the same capacity, I likewise boarded and took charge of the said yacht, relieving also the day inspector, whom I found on board and in charge. I so remained on board and in charge continuously each night until the morning following the days aforesaid and until I passed the charge of the vessel over to the day inspector who was designated and came on board to relieve me. During the entire time mentioned I had and considered myself as having absolute and entire control and possession of the yacht as and for the collector of customs of the port aforesaid. During this time no assertion of custody or possession was made by any marshal, deputy marshal, or other person, nor was any attempt or offer made by any such officer or person to interfere with my coming on board, remaining there, or with my charge and control, which was well known and understood by all persons aboard the vessel to be that of the collector of customs.

57 JOSEPH WALLACE,
*Night Inspector.*

Sworn to and subscribed before me this 6th of October, 1891.
[SEAL.] C. H. HEYZER,
*Notary Public, N. Y. Co.*

(Endorsed:) Filed Oct. 8, 1891.

58 STATE OF NEW YORK,
*City and County of New York, ss:*

I, Kenneth S. Johnson, being sworn, saith that I am an inspector of customs in the United States customs revenue service. On the 31st day of August, 1891, as inspector aforesaid, under authority of the collector of customs at New York, I took charge on board of the steam yacht "Conqueror" at or about five o'clock in the afternoon, relieving inspector

Richard H. Barry. I remained on board so in charge until seven o'clock of the morning of the 1st of September, 1891. During this time the said vessel's position at anchor was off Stapleton, Staten Island, about one thousand feet from shore, to the westerly of the main channel of the Bay of New York, at that point and between such channel and the shore of Staten Island aforesaid.

KENNETH S. JOHNSON.

Sworn before me this 2nd day of October, 1891.
[SEAL.] WALTER R. EATON,
*Notary Public, Kings County.*
*Certificate filed in N. Y. Co.*

59 STATE OF NEW YORK,
*City and County of N. York, ss:*

I, Richard H. Barry, being sworn, saith that I am an inspector of customs in the customs service of the United States. On the 1st of September, 1891, at or about 7 o'clock, morning, as such inspector I took charge on board of the steam yacht Conqueror under and by authority of the collector of customs of the port of New York, thereby relieving another officer. I remained so in charge continuously on board until about five o'clock, afternoon, of that day when I was relieved by R. T. Chartier, an inspector of customs. During the time aforesaid the said vessel's position at anchor was off Stapleton, Staten Island, about one thousand feet from shore, to the west of the main channel of New York Bay, at that point and between such channel and the shore of Staten Island aforesaid.

RICHARD H. BARRY.

Sworn to before me this 2nd day of October, 1891.
[SEAL.] WALTER R. EATON,
*Notary Public, Kings County.*
*Certificate filed in N. Y. Co.*

60 STATE OF NEW YORK,
*City & County of New York, ss:*

I, R. T. Chartier, being duly sworn, saith that I am an inspector of customs in the United States customs revenue service. On the 1st of September, 1891, at or about five o'clock in the afternoon, as inspector aforesaid, I took charge on board of the steam yacht "Conqueror" under authority of the collector of customs for the port of New York, thereby relieving Richard H. Barry. I remained on board so in charge until about seven or eight o'clock of the morning of September 2nd, 1891, when I was relieved by Inspector Peter T. O'Neill. During the time aforesaid the said vessel was at anchor off Stapleton, Staten Island, about one thousand feet from the shore, to the westwardly of the main channel of the bay of New York, at that point and between such channel and the shore of Staten Island aforesaid.

RAY T. CHARTIER.

Sworn to before me this 2nd of October, 1891.
[SEAL.] WALTER R. EATON,
*Notary Public, Kings County.*
*Certificate filed in N. Y. Co.*

(Endorsed:) Filed Oct. 8, 1891.

61 U. S. district court, southern dist. of N. York.

FREDERICK W. VANDERBILT } In admiralty.
*v.*
THE YACHT "CONQUEROR." }

STATE OF NEW YORK, *City and Co. of N. York*:

I, Henry E. Olley, being sworn, saith that I am an inspector of customs in the customs service of the United States. As such inspector I took charge of the yacht "Conqueror," by official designation and under authority of the collector of customs for the port of New York, at or about seven o'clock this morning, the 6th of October, 1891, thereby relieving the night inspector, Mr. Kasmire, whom I found in charge on board. I remained on board in charge as aforesaid until twelve o'clock noon to-day, when I was relieved by Day Inspector Peter T. O'Neill, who took my place. During the time I so remained I had absolute charge and control of the yacht and possession thereof as and for the collector of customs without question or interference by any marshal, deputy marshal, or other person. I had no official information or intimation that a deputy marshal or other person was on board claiming or asserting custody or possession of the vessel, and during the time no one attempted or offered to interfere with my charge thereof.

H. E. OLLEY.

Sworn to and subscribed before me this 6th of October, 1891.
[SEAL.] R. H. FRENCH,
*Notary Public.*

62 U. S. district court, southern dist. N. York.

FREDERICK W. VANDERBILT } In admiralty.
*v.*
THE YACHT "CONQUEROR." }

STATE OF NEW YORK, *City & Co. of N. York:*

I, Thomas Kenny, being sworn, saith that I am a United States inspector of customs at the port of New York. As such inspector I took charge of the yacht Conqueror, lying in the Erie basin, South Brooklyn, under official designation and by authority of the collector for the said port, at or about seven o'clock in the morning of Sunday, the 4th of October, 1891, thereby relieving Night Inspector Kasmier, whom I found on board in charge. I remained on board continuously in charge aforesaid until about six o'clock in the evening, when I was relieved by a night inspector, Mr. Wallace, who took my place on board the vessel. During the said time I so remained on board I had absolute control and charge of the yacht, also possession thereof, for the collector of customs, without question or interference by any marshal, deputy, or other person. There was no assertion by any person of possession of the vessel other than myself, and no attempt or offer to disturb or interere with me.

THOMAS KENNY.

Sworn to and subscribed before me this 6th of October, 1891.
[SEAL.] R. H. FRENCH,
*Notary Public.*

(Endorsed:) Filed Oct. 8, 1891.

63 District court of the United States, southern district of New York.

FREDERICK W. VANDERBILT, LIBELLANT,
*vs.*
THE YACHT "CONQUEROR" AND J. SLOAT FASSETT, respondents,

The marshal having returned the alias process issued under Judge Benedict's order dated September 23, 1891, that he had attached said yacht.

And the district attorney appearing specially for the collector of the port, having filed ten affidavits traversing the return of the marshal.

And it appearing to the court to be doubtful whether the marshal's attachment is sufficient for the purposes of this suit.

Now, therefore, on motion of Root & Clarke, proctors for the libellant, it is

Ordered, That another process issue for the attachment of said yacht, in the same form as said alias process (except as to the time of notice to be given) returnable October 13, 1891, at eleven o'clock in the forenoon, and that the marshal execute the same by taking full and exclusive possession of said yacht. It is further

Ordered, That a copy of this order be annexed to such process, and
64 that notice to all persons to appear and intervene for their interests in the above-entitled cause be published by the marshal until said 13th day of October, 1891.

Dated New York, October 8th, 1891.

ADDISON BROWN.

(Endorsed:) Filed October 8, 1891.

65 I do hereby certify that, on the 8th day of October, 1891, in obedience to the annexed process in the waters of Kings County, N. Y., and within the admiralty jurisdiction of this court, I attached the within-named yacht "Conqueror," her tackle, &c., by taking full and exclusive possession thereof, as required by the annexed order; and I do further certify that the same is now and has been continuously since said attachment in my exclusive possession under process issued to me herein.

I do further certify that I have given due notice, as appears by the proof of publication hereto annexed, to all persons claiming said yacht, her tackle, &c., that this court will, on the 13th day of October inst. (if that be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

JOHN W. JACOBUS,
*U. S. Marshal.*

NEW YORK, *October 13th*, 1891.

66 United States district court, southern district of New York.

NOTICE.—I have arrested the yacht Conqueror, her tackle, etc., impleaded with J. Sloat Fassett, libeled by Frederick W. Vanderbilt, for possession. Process returnable and cause to be heard October 13, 1891,

at 11 a. m. in said court, United States court and post-office building, New York City. All persons interested must then present their claims or be defaulted, and said vessel condemned.

New York, October 8, 1891.

JOHN W. JACOBUS,
*U. S. Marshal.*
ROOT & CLARK,
*Libellant's Proctors.*

67 STATE OF NEW YORK,
*City and County of New York, ss:*

Thomas Mulhearn, of the city of New York, being duly sworn, says he is chief clerk in the office of the Mail and Express, a daily paper printed and published in the city of New York, and that the notice of which the annexed is a printed copy has been regularly published in the said Mail and Express for four times successively, commencing on the eight day of October, 1891.

THOMAS MULHEARN.

Sworn before me this 12th day of October, 1891.

WM. R. WORRALL,
*Notary Public, No. 70, City and County of New York.*

68 SOUTHERN DISTRICT OF NEW YORK, *ss:*

The President of the United States of America to the marshal of the southern district of New York, greeting:

Whereas a libel in rem and personam hath been filed in the district court of the United States for the southern district of New York, on the 1st day of September, in the year of our Lord one thousand eight hundred and ninety-one, by Frederick W. Vanderbilt against J. Sloat Fassett. (Cause of possession in which the libellant as owner of said yacht alleges that said Fassett, under a claim of official authority as collector of customs, has illegally and wrongfully deprived him of the possession of said yacht). For the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steam yacht or vessel, her tackle, &c., may be cited in general and special to answer the premises and all proceedings being had, that the said steam yacht or vessel, her tackle, &c., may for the causes in the said libel mentioned be delivered to the libellant.

You are therefore hereby commanded to attach the said steam
69 yacht or vessel, her tackle, &c., and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be delivered to the libellant pursuant to the prayer of the said libel, that they be and appear before the said court to be held in and for the southern district of New York, on the 13th day of October inst., at 11 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise the

next day of jurisdiction thereafter then and there to interpose a claim for the same, and to make their allegations in that behalf.

Witness the honorable Addison Brown, judge of said court, this 8th day of October, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and sixteenth.

SAM'L H. LYMAN,
*Clerk.*

ROOT & CLARKE,
*Libellant's Proctors.*

(Endorsed:) I hereby depute John E. Dowley to execute the within process. John W. Jacobus, U. S. marshal, S. D. N. Y. N. Y., October 8, 1891. Filed Oct. 13, 1891.

70 U. S. district court, south. dist of N. York.

FREDERICK W. VANDERBILT
*v.*
THE YACHT CONQUEROR. } In admiralty.

STATE OF NEW YORK,
*City and Co. of N. York:*

I, Peter T. O'Neill, being sworn, saith that I am an inspector of customs in the United States revenue service at the port of New York. On the 8th of October, 1891, as inspector aforesaid and by authority of the collector of customs for that port, I was in the charge and control of the yacht "Conqueror" on board the same as the custodian of the collector aforesaid. On that day, at or about 3 o'clock in the afternoon, five men, representing themselves as United States deputy marshals, forced themselves on board the said yacht then lying in the Erie Basin South Brooklyn and so in my custody. They insisted upon taking possession of the vessel, whereupon I informed them that I was in possession of the same for the collector of customs for the port of New York, and that I could not and would not recognize them as having any right to come on board which they had done against my protest; and moreover that I would maintain possession of the vessel for my superior officer under whose authority I was holding the same. After some parleying they said they would put me off the vessel, which they proceeded to do, laying hands upon me for the purpose and accomplishing the same with an exhibition of force which I was unable to resist. They thus led me off the vessel outside the
71 rail and to the shore, against my protest, which I repeatedly made.

PETER T. O'NEILL.

Sworn to and subscribed before me this 9th day of October, 1891.
[SEAL.]

WALTER R. EATON,
*Notary Public, Kings County,*
*Certificate filed in N. Y. Co.*

(Endorsed:) Filed Oct. 13, 1891.

72 U. S. district court, southern district of New York.

FREDERICK W. VANDERBILT
*vs.*
THE YACHT "CONQUEROR" AND J. SLOAT FASSETT. } In admiralty.

SIR: You will please enter my appearance as proctor for J. Sloat Fassett in personam, and as late collector of customs at the port of New York on behalf of the United States, and for Francis Hendricks, as collector of customs at the port of New York, claimant, on behalf of the United States.

Dated October 13th, 1891.

EDWD. MITCHELL,
*U. S. Attorney.*

To SAMUEL H. LYMAN, Esq.,
*Clerk.*

(Endorsed:) Filed Oct. 13, 1891.

73 *To the honorable the district court of the United States in and for the southern district of New York.*

The answer and exceptions of J. Sloat Fassett, in personam, by Edward Mitchell, district attorney of the United States of America for the southern district of New York, and proctor for said J. Sloat Fassett to the libel of Frederick W. Vanderbilt, owner of the vessel or steam yacht Conqueror, alleges as follows:

1. He is ignorant of the matters alleged in the 2nd, 3rd, 4th, and 5th articles of said libel contained.

2. He denies that he took possession of said yacht within the jurisdiction of this court, but, on the contrary, he alleges that before and at the time of filing said libel and until the 29th day of September last, said yacht was in the waters of Richmond County, and not within the territorial jurisdiction of this court.

3. He admits the matters alleged in the 1st and 7th articles of said libel.

4. He denies that he took possession of said yacht wrongfully, as alleged in the 6th article of said libel.

5. He alleges that all and singular his acts relating to the taking
74 and detaining of said yacht were done by him in his official capacity as collector of customs at the port of New York in the performance of his public duty, under the instructions of the Secretary of the Treasury, and under and by virtue of the revenue laws of the United States, and on behalf of the United States and not otherwise.

Wherefore the said J. Sloat Fassett, by his said proctor, Edward Mitchell, United States attorney, prays that said libel be dismissed with costs, and that this honorable court may otherwise right and justice administer in the premises.

EDWD. MITCHELL,
*U. S. Attorney and Proctor for J. Sloat Fassett.*

OCT. 15, 1891.

(Endorsed:) Filed Oct. 15, 1891.

75 *To the honorable the district court of the United States in and for the southern district of New York.*

The claim, answer, and exceptions of J. Sloat Fassett, late collector of customs at the port of New York, for and on behalf of the United States, by Edward Mitchell, district attorney of the United States of America for the southern district of New York, intervening for the interest and possession of the said United States in the said vessel or steam yacht Conqueror, her tackle, apparel, and furniture, to the libel of the said Frederick W. Vanderbilt, alleges as follows:

1. That the said J. Sloat Fassett, lately as collector of customs at the port of New York, on behalf of the United States claimed the said vessel or steam yacht Conqueror, her tackle, apparel, and furniture, for the enforcement of the payment of lawful duties thereon under the revenue laws of the United States, which have not been paid, and which became due upon the arrival of said yacht in the port of New York from a foreign country on or about the 6th day of July, 1891.

2. That he is ignorant of the matters alleged in 2nd, 3rd, 4th, and 5th articles of said libel contained.

3. He denies that he took possession of said yacht within the jurisdiction of this court, but, on the contrary, alleges that before and at
76 the time of filing said libel, and until the 29th day of September last, said yacht was in the waters of Richmond County and within the exclusive territorial jurisdiction of the eastern district of New York and not within the territorial jurisdiction of the southern district of New York, and that he took possession of said yacht on behalf of the United States lawfully within the said waters of Richmond County, and he denies that he illegally or wrongfully took possession of said yacht as alleged in the 6th article of said libel.

4. He admits the matters alleged in the 1st and 7th articles of said libel.

5. He further alleges that, as he is advised, the said yacht is an article imported from a foreign country and subject to duties under the revenue laws of the United States.

6. That in pursuance of an order of the Secretary of the Treasury, and under and by virtue of the revenue laws of the United States, he, said Fassett, as collector of customs at the port of New York, on behalf of the United States and not otherwise, took possession of said yacht Conqueror on the 27th day of August, 1891, in the port of New York, for the enforcement of the payment of duties thereon as aforesaid and not otherwise, and the collector of customs at the port of New York has been ever since said date and is now in the lawful possession thereof, and the same
77 has not been since said date and is not now in the lawful possession or custody of any other person or persons, officer or officers.

7. That this honorable court has no jurisdiction of the matters contained in said libel, the same not being a civil cause of admiralty and maritime jurisdiction; the possession of the collector of the port of New York, as aforesaid, on behalf of the United States, being possession thereof provided for by the revenue laws of the United States, and the said yacht being property taken or detained by the collector of the port, under authority of the revenue laws of the United States, and in custody of the law.

Wherefore the said attorney, on behalf of the United States, prays that said libel be dismissed with costs; that this honorable court decree restitution of the possession of said yacht to the collector of customs at the port of New York, and otherwise right and justice administer in the premises.

EDWD. MITCHELL,
*U. S. Attorney.*

OCT. 15, 1891.

(Endorsed:) Filed Oct. 15, 1891.

78 *To the honorable the district court of the United States in and for the southern district of New York.*

The claim, answer, and exceptions of Francis Hendricks, collector of customs at the port of New York, for and on behalf of the United States, by Edward Mitchell, district attorney of the United States of America for the southern district of New York, intervening for the interest and possession of the said United States in the said vessel or steam yacht Conqueror, her tackle, apparel, and furniture, to the libel of the said Frederick W. Vanderbilt, alleges as follows:

1. That the said Francis Hendricks, as collector of customs at the port of New York on behalf of the United States, now claims the said vessel or steam yacht Conqueror, her tackle, apparel, and furniture, for the enforcement of the payment of lawful duties thereon under the revenue laws of the United States, which have not been paid, and which became due upon the arrival of said yacht in the port of New York from a foreign country on or about the 6th day of July, 1891.

2. He alleges that said yacht was not within the jurisdiction of this court at the time of filing the libel herein, and denies that said yacht was then within said jurisdiction as alleged in the 6th article of said libel.

79 3. He further alleges that, as he is advised, the said yacht is an article imported from a foreign country and subject to duties, under the revenue laws of the United States.

4. That in pursuance of an order of the Secretary of the Treasury, and under and by virtue of the revenue laws of the United States, J. Sloat Fassett, as collector of customs at the port of New York, on behalf of the United States, and not otherwise, took possession of said yacht Conqueror on the 27th day of August, 1891, in the port of New York for the enforcement of the payment of duties thereon as aforesaid, and not otherwise, and the collector of customs at the port of New York from August 27th, 1891, until the 8th day of October, 1891, was in the actual possession thereof on behalf of the United States and between said last-mentioned dates the same was not in the actual possession or custody of any other person or persons, officer or officers. On the 8th day of October, 1891, five men, representing themselves to be deputy marshals, by physical force took actual possession of said yacht in the Erie Basin in South Brooklyn, where said yacht has been placed in store, under general order, by the collector of customs at the port of New York, and forcibly removed the collector's officer therefrom, and forcibly took away the said yacht from the actual possession and custody of the United States.

5. That notwithstanding the exercise of physical force, as aforesaid, the collector of customs at the port of New York claims that he is, on
80 behalf of the United States, in lawful possession of said yacht, and for public purposes as aforesaid, and is entitled of right to the actual possession and custody thereof.

6. That this honorable court has no jurisdiction of the matters contained in said libel, the same not being a civil cause of admiralty and maritime jurisdiction; the possession of the collector of the port of New York, as aforesaid, on behalf of the United States, being possession thereof provided for by the revenue laws of the United States, and the said yacht being property taken or detained by the collector of the port, under authority of the revenue laws of the United States, and in custody of the law.

Wherefore the said attorney, on behalf of the United States, prays that said libel be dismissed with costs, that this honorable court will be pleased to decree a restitution of the said yacht to him, as collector of customs at the port of New York, on behalf of the United States, and otherwise right and justice to administer in the premises.

EDWD. MITCHELL,
*U. S. Attorney.*

OCT. 15, 1891.

(Endorsed:) Filed Oct. 15, 1891.

81 (Indorsed:) District court of the United States for the southern district of New York. Jacob Sloat Fassett, collector of customs for the port of New York vs. The judge of the United States district court for the southern district of New York. Return.

82 (Indorsed on cover:) Supreme Court U. S. 1891, October term. No. 10. Original exparte in the matter of J. Sloat Fassett, petitioner. Return to rule by Judge Brown. Filed Oct. 31, 1891.

Office Supreme Court U. S.
FILED,
DEC 14 1891
JAMES H. McKENNEY,
CLERK.

# In the Supreme Court of the United States.

OCTOBER TERM, 1891.

EX PARTE, IN THE MATTER OF J. SLOAT FASSETT, PETITIONER. No. 10, Original.

PETITION FOR A WRIT OF PROHIBITION.

## BRIEF FOR THE PETITIONER.

# In the Supreme Court of the United States.

OCTOBER TERM, 1891.

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EX PARTE, IN THE MATTER OF J. SLOAT FASSETT, PETITIONER. No. 10, Original.

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**PETITION FOR A WRIT OF PROHIBITION.**

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## BRIEF FOR THE PETITIONER.

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### STATEMENT OF THE CASE.

This is a proceeding in prohibition brought by the collector of customs at New York to restrain the district court for the southern district of New York from proceeding to try a libel filed by F. W. Vanderbilt in that court against a steam yacht known as *The Conqueror* and against the collector of customs, in whose custody the yacht was. The libellant is the owner of the yacht. It was taken from his possession by the collector of customs, and was held by the collector for the payment of

duties decided by him to be payable on its importation. The yacht is a steam-screw yacht of about 371 tons gross tonnage. She was built in Glasgow, Scotland. She was designed to navigate the high seas; not for the conveyance of passengers or of merchandise for hire, but as a pleasure yacht only, and has never been put to any other use.

In May, 1891, her owner, a British subject, sold and delivered her to F. W. Vanderbilt, a resident and citizen of the United States. In June, 1891, she sailed to Halifax and thence to the United States, arriving in the port of New York on the 6th day of July, 1891. Her master made due entry of the vessel at the port, and reported her arrival to the collector of customs, delivering a manifest to him. The master also presented to the collector the bill of sale for record and certification. The collector recorded the bill of sale in his office and indorsed upon the original, which was delivered back to the master, a certificate that the same was properly recorded in his office, which document the yacht has ever since carried for the purpose of showing that she is American property. The first process issued from the court was not executed, because the collector would not permit the marshal to take possession of the vessel. Afterwards, however, the process was executed, and the marshal took the vessel out of the hands of the collector. The collector then appeared in the district court, filed an answer and exceptions by the district attorney (Rec., p. 31), in the seventh of which he avers that the district court "has no jurisdiction of the matters contained in said libel, the same not being a civil cause of admiralty and maritime jurisdiction; the possession of the collector

of the port of New York, as aforesaid, on behalf of the United States being the possession thereof provided for by the revenue laws of the United States, and the said yacht being property taken or detained by the collector of the port under authority of the revenue laws of the United States and in custody of the law." Wherefore he prays that the said libel be dismissed. The petition and the return make out the foregoing state of facts, as to which there is no dispute.

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## ARGUMENT.

### 1.

The question in the case is whether the district court has jurisdiction to try a libel in the nature of a possessory action, filed on behalf of the American owner of a British-built pleasure yacht, brought into this country, and against the yacht, and the collector of customs who holds the yacht for duties which he has decided, by virtue of the tariff laws, to be assessable thereon.

We contend, on behalf of the collector, that when he took possession of the vessel and decided that the same was dutiable, the only remedy open to the owner of the vessel was to pay the duties under protest and in this way secure possession of his vessel, with the right thereafter, as provided in the act of June 10, 1891, to obtain a refund of those duties by appeal from the decision of the collector to the Board of United States General Appraisers, and by appeal from that board to the circuit court of the

United States, and thence to the circuit court of appeals or the Supreme Court. The power of the Government of the United States to provide an exclusive mode of procedure for remedying wrongs committed and suffered in the collection of its duties and taxes can not be denied. It has been asserted and recognized in so many cases by this court that it is hardly necessary to refer to them. (*Auffmordt* vs. *Hedden*, 137 U. S. R., 310; *Cheatham* vs. *United States*, 92 U. S. R., 85; *Murray's Lessee et al.* vs. *Hoboken Land and Improvement Co.*, 18 How., 272.)

Now, what provision has the Government made with respect to the procedure to be had in the collection of duties on imports and the custody of such imports? Section 2785 of the Revised Statutes provides as follows:

> The owner or consignee of any merchandise on board of any such vessel, or in case of his absence or sickness his known agent or factor in his name, shall within fifteen days after the report of the master to the collector of the district for which such merchandise shall be destined, make entry thereof in writing with the collector, and shall in such entry specify the name of the vessel and of her master, in which, and the port or place from which, such merchandise was imported, the particular marks, numbers, denominations, and prime cost, including charges of each particular package or parcel whereof the entry shall consist, or, if in bulk, the quantity, quality, and prime cost, including charges thereof, particularly specifying the species of money in which the invoices thereof are made out. Such entry shall be subscribed by the person making it, if the owner or consignee in his own name, or if another person in his name as agent or factor, for the owner or consignee. The person

making such entry shall also produce to the collector and naval officer, if any, the original invoices of the merchandise, or other documents received in lieu thereof or concerning the same, in the same state in which they were received, with the bills of lading for the same; which invoices shall be signed by the persons in the offices of the collector and naval officer, who have compared and examined them.

Section 2963 provides:

When merchandise, imported into the United States has not been entered in pursuance of the provisions of any act regulating imports and tonnage, the same shall be deposited in the public warehouse, and shall there remain at the expense and risk of the owner until such invoice is produced. Nothing herein contained shall be understood to prohibit the sale of such quantities of merchandise so stored as may be necessary to discharge the duties thereon, and all intervening charges, at the time or times when such duties shall become due and payable.

Section 2964 provides:

In all cases of failure or neglect to pay the duties within the period allowed by law to the importer to make entry thereof, or whenever the owner, importer, or consignee shall make entry for warehousing the same, in writing, in such form and supported by such proof as shall be prescribed by the Secretary of the Treasury, the merchandise shall be taken possession of by the collector, and deposited in the public stores, or in other stores to be agreed on by the collector or chief revenue officer of the port, and the importer, owner, or consignee, such stores to be secured under the joint locks of the inspector and importer, and there to be kept with due and reasonable care, at the charge and risk of the owner, importer,

consignee, or agent, and subject at all times to their order, upon payment of the proper duties and expenses, to be ascertained on due entry thereof for warehousing, and to be secured by a bond of the owner, importer, or consignee, with surety to the satisfaction of the collector, in double the amount of the duties, and in such form as the Secretary of the Treasury shall prescribe.

Section 2899 provides:

No merchandise liable to be inspected or appraised shall be delivered from the custody of the officers of the customs, until the same has been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector. The collector may, however, at the request of the owner, importer, consignee, or agent, take bonds, with approved security, in double the estimated value of such merchandise, conditioned that it shall be delivered to the order of the collector, at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. If in the mean time any package shall be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond, the bond shall, in either case, be forfeited.

Section 2926 provides:

All merchandise, of which incomplete entry has been made, or an entry without the specification of particulars, either for want of the original invoice, or for any other cause, or which has received

damage during the voyage, shall be conveyed to some warehouse or storehouse, to be designated by the collector, in the parcels or packages containing the same, there to remain, with due and reasonable care, at the expense and risk of the owner or consignee, under the care of some proper officer, until the particulars, cost, or value, as the case may require, shall have been ascertained either by the exhibition of the original invoice thereof, or by appraisement, at the option of the owner, importer, or consignee, and until the duties thereon shall have been paid, or secured to be paid, and a permit granted by the collector for the delivery thereof.

Section 2973 provides that—

If any merchandise shall remain in the public store beyond one year, without payment of the duties and charges thereon, except as hereinbefore provided, then such merchandise shall be appraised by the appraiser, if there be any at such port, and if none, then by two merchants to be designated and sworn by the collector for that purpose, and sold by the collector at public auction, on due public notice thereof being first given, in the manner and for the time to be prescribed by a general regulation of the Treasury Department. * * * The proceeds of such sales, after deducting the usual rate of storage at the port in question, with all other charges and expenses, including duties, shall be paid over to the owner, importer, consignee, or agent, and proper receipts taken for the same.

By sections 10, 11, 12, and 13 of the act of June 10, 1890 (26 Stats., 136), provision is made for the fixing of the value of imports, first by the local appraisers, and

then finally and conclusively by the board of general appraisers. Sections 14, 15 and 25 are as follows:

SEC. 14. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within ten days after "but not before" such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of the three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an applica-

tion shall be filed in the circuit court within the time and in the manner provided for in section fifteen of this act.

SEC. 15. That if the owner, importer, consignee, or agent of any imported merchandise, or the collector, or the Secretary of the Treasury, shall be dissatisfied with the decision of the board of general appraisers, as provided for in section fourteen of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them may, within thirty days next after such decision, and not afterwards, apply to the circuit court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision. Such application shall be made by filing in the office of the clerk of said circuit court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall order the board of appraisers to return to said circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decisions thereon; and all the evidence taken by and before said appraisers shall be competent evidence before said circuit court; and within twenty days after the aforesaid return is made the court may, upon the application of the Secretary of the Treasury, the collector of the port, or the importer, owner, consignee, or agent, as the case may be, refer it to one of said general appraisers, as an officer of the court, to take and return to the court such further evidence as may be offered by the Secretary of the Treasury, collector, importer, owner, consignee, or

agent, within sixty days thereafter, in such order and under such rules as the court may prescribe; and such further evidence with the aforesaid returns shall constitute the record upon which said circuit court shall give priority to and proceed to hear and determine the questions of law and fact involved in such decision respecting the classification of such merchandise and the rate of duty imposed thereon under such classification; and the decision of such court shall be final; and the proper collector, or person acting as such, shall liquidate the entry accordingly, unless such court shall be of opinion that the question involved is of such importance as to require a review of such decision by the Supreme Court of the United States, in which case said circuit court, or the judge making the decision, may, within thirty days thereafter, allow an appeal to said Supreme Court; but an appeal shall be allowed on the part of the United States whenever the attorney-general shall apply for it within thirty days after the rendition of such decision. On such original application, and on any such appeal, security for damages and costs shall be given as in the case of other appeals in cases in which the United States is a party. Said Supreme Court shall have jurisdiction and power to review such decision, and shall give priority to such cases, and may affirm, modify, or reverse such decision of such circuit court, and remand the case with such orders as may seem proper in the premises, which shall be executed accordingly. All final judgments, when in favor of the importer, shall be satisfied and paid by the Secretary of the Treasury from the permanent indefinite appropriation provided for in section twenty-three of this act. For the purposes of this section the circuit courts of the United States shall be deemed always open, and said circuit

courts, respectively, may establish, and from time to time alter, rules and regulations not inconsistent herewith for the procedure in such cases as they shall deem proper.

SEC. 25. That from and after the taking effect of this act no collector or other officer of the customs shall be in anyway liable to any owner, importer, consignee, or agent of any merchandise, or any other person, for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise or any other matter or thing as to which said owner, importer, consignee, or agent of such merchandise might under this act be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided for in this act.

It will be seen from the foregoing that Congress intended to create an administrative tribunal for the decision of questions arising under the tariff laws as to the duty to be imposed upon articles and merchandise imported. It is provided, first, that, the collector shall take possession of the imports, and then that he shall decide upon the rate and amount of duties payable thereon. No appeal can be taken from the decision of the collector until the amount of duties is either paid or secured under the bonded-warehouse system. Then an appeal may be taken for the recovery of the duties paid, and in this way only, we submit, can the taxpayer whose property has been seized repossess himself of the same. If an entry is not made and the duties are not paid within a year, the article held is to be sold and the duties and charges paid. The collector is rendered entirely free from any liability for

the collection of duties and *ex necessitate* from liability for any act by which he is empowered to enforce or secure such collection, as for instance, the detention of the articles imported.

Section 934 provides that—

> All property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

Is is not necessary for us to contend that this prevents a possessory action of any kind against a revenue officer in custody of property whose seizure is justified under the revenue laws. It may be that, in cases of forfeitures and seizures for violations of the law, the only way to test the legality of the seizure by the revenue officer, is to bring a suit against him to try the legality of his custody of the property seized. The effect of the section quoted in such a case would be to require the custody of the article to remain unchanged until the final decree settling the legality of the original seizure.

The authorities cited on the other side to show that possessory actions in admiralty may be entertained by the court to recover property seized for violation of the revenue laws are all cases where the seizure was the preliminary step in a forfeiture or penal proceeding. The law does not in such cases create a special administrative tribunal to pass upon the question of the rightfulness of the seizure, and therefore the district court sitting in admiralty, where the thing seized is peculiarly within the

admiralty jurisdiction, may hear and determine the question of the legality of the seizure. The effect of section 934, in such a case, is only to leave the thing seized in the custody of the revenue officer, and not to transfer it to the marshal of the court until after final decree. The case at bar, however, is different. Here there is an administrative tribunal created, with exclusive jurisdiction to try the one question upon which the legality of the detention by the collector depends. The creation of that tribunal excludes the jurisdiction of one whose aid ordinarily might be invoked by the owner of the property to determine the legality of the custody of the collector.

The case of *McLean* vs. *Hager* (31 Federal Reporter, 602) is the only one of the cases cited that can not be thus distinguished from the case at bar. There the collector seized for duty cases of opium for smoking which had been shipped from Honolulu to Panama by way of San Francisco. The opium was transferred from one ship to another in San Francisco, and a bond tendered securing its conveyance out of the country. The action was for trespass against the collector, and Judge Sawyer held that it would lie, because the opium was not imported into this country. Here we do not deny that if the yacht was not imported into this country the collector would have no jurisdiction to detain her. But we maintain that she was imported. The discussion of this point we shall postpone. We are now considering the question whether, when the thing is imported, the custody of the collector can be inquired into by the district court sitting in admiralty.

It is said that no man is above the law, and therefore that when the collector takes wrongful possession of a ship the

citizen wronged must have his remedy to recover possession of his property. If the decision of the collector as to the rate and amount of duties is correct, then his taking of the vessel is not a wrong. If his decision were by law final, it would be necessarily correct, and therefore there would be no wrong to remedy. His decision is final, unless a certain course is taken by the taxpayer. This is the payment of the taxes under protest to get possession of the goods and a suit to recover back the same. Unless possession is thus obtained, therefore, no right to possession exists, because the decision of the collector is final, and the rightful custody of the collector is conclusively established. To say that the collector is not above the law is mere rhetoric. He is not above the law; he is simply acting within the law when he is exercising that judgment and power of detention conferred by law upon him.

The objection made by the importer here is that his ship is not liable to duty at all. It is certainly within the scope of the power imposed upon the collector in deciding the amount and rate of duties to decide whether the merchandise is dutiable at all. There is in every tariff law a free list. It is the duty of the collector primarily to construe that free list, and under the power given him by section 14 of the administrative act of June 10, 1891 (which is but an amendment of section 2931 of the Revised Statutes), it is within his power and duty to decide whether anything which is imported into this country is within that free list. That an imported article is under the law not subject to duty does not therefore oust the jurisdiction of the collector to decide the question of

duty or no duty upon the article. Deciding that it is subject to duty, sections 2963 and 2964 require him to take the article into his possession and to hold the same for a proper entry and the payment of the assessed duties.

## 2.

We think we have shown that it is beyond the jurisdiction of the district court in admiralty to entertain a possessory action for imported merchandise held by the collector for duty. We come to the question whether the yacht *Conqueror* was imported merchandise. The tariff act of October 1, 1890 (26 Stats., p. 567), provides that:

> On and after the sixth day of October, eighteen hundred and ninety, unless otherwise specially provided for in this act, there shall be levied, collected, and paid, upon all *articles imported* from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are by the schedules and paragraphs respectfully prescribed, namely, etc.

Section 2766 of the Revised Statutes provides as follows:

> The word "merchandise" as used in this title may include goods, wares, and chattels of every description capable of being imported.

The word "article" is certainly wide enough in its ordinary use to include a steam yacht. In Junge *vs.* Hedden (38 Fed. Rep., 197, 198), Judge Lacombe shows that the term "article" is used in the widest sense. That a ship is personal property and a chattel within the definition of the term given in the law of personal property

will hardly be denied. (See Anderson's Law Dictionary, title Ship, p. 950; Schouler on Pers. Prop., secs. 55 and 302.)

It may be conceded that there is no clause in the tariff laws imposing a tax upon pleasure yachts or ships *eo nomine*, but that there are general descriptions within the tariff laws within which such a vessel as this may be included can not be denied. Congress has expressly recognized that duties are leviable upon vessels manufactured in a foreign country and imported into this country. In 20 Statutes, page 473, chapter 193, the Secretary of the Treasury is "authorized and directed to grant an American registry to the Canadian steam ferryboat *Geneva*, now owned by B. W. Folger and M. H. Folger, citizens of the United States, and residing at Cape Vincent, N. Y., upon the payment into the United States Treasury of the duties legally chargeable upon said vessel," which was an express recognition by Congress that duties in some cases were chargeable upon vessels and ships.

The practice of the Treasury Department with respect to vessels of this character further supports our contention. By Treasury Decision 4960 the yacht *Madge*, imported on the deck of another vessel, because she belonged to the Royal Yacht Club of Great Britain, and was brought into the United States for racing purposes only, was admitted free of duty; but when she was sold to a citizen of the United States, under instructions from the Department of March 17, 1882, duty was collected from the purchaser.

On July 30, 1885 (Treasury Decisions S. S. 7084), free entry was refused for a steamboat, as tools of the trade of a person engaged in fishing, arriving in the United States.

On December 22, 1886 (Treasury Decisions 7937), free entry was refused of a yacht 40 feet in length, 6½ feet in breadth, and 2½ feet in depth.

On June 14, 1888 (Treasury Decisions 8931) the Department held that the *Nautilus*, a small steam yacht arriving at New York from Canada via the canal and the Hudson River, was a regular importation of a foreign-built vessel, and subject to the payment of duty. The fact that she propelled herself was held to have no bearing on her dutiable character.

On August 8, 1888 (Treasury Decisions 8976) the Department held that the *Geneva*, a steam ferryboat, was liable to duty, and refused free entry of her machinery, although it was of American manufacture, holding that it had lost its identity as machinery, and had become identified with the vessel as one of her parts.

We thus see from the decisions of the Treasury Department that the tariff laws have not been construed to exclude from their operation vessels manufactured abroad and purchased by citizens of this country, who have transferred the home of the ship, so to speak, to the United States. The materials brought into this country of which ships and vessels are made have always paid a duty, and do now, unless they go into the construction of vessels used exclusively in the foreign trade. (See sections 8 and 9 of the tariff act of October 1, 1890.) All the provisions of the tariff law are intended to encourage ship building in this country. Is it possible, therefore, after requiring that duties shall be paid on ship materials, that when the whole ship is manufactured and brought into this country, for

scribed by the Secretary of the Treasury." If a vessel built in the United States may be exported within the meaning of the tariff laws, it necessarily follows that a vessel built in Great Britain may be imported into the United States.

We are asked to distinguish this case from the case of a foreign ship which comes into a port of this country and goes out again. The distinction is apparent. The deck of a foreign merchant ship, in the comity which exists between nations, is regarded as more or less within the jurisdiction of the country whose flag she flies. When she enters the port of another country, it is with the intention of her master and owner to make such port but a temporary stopping place. By treaty usually, and by comity always, her entering the port is not regarded as an importation of a ship, but only an importation of the cargo she carries. Commercial treaties exist with respect to almost every civilized nation on the globe securing the free entries of ships into the ports of this country. A foreign ship is owned abroad. Her registry and the record of her title are in a foreign place and nation. Her home is elsewhere. Therefore it is that her coming into the ports of this country for a temporary purpose is not within the tariff laws considered an importation. By law she is forbidden to carry goods from one port of this country to another. (See section 4347, Rev. Stat.) There is no law forbidding Mr. Vanderbilt, when he has recorded his title in the New York custom-house, from going from port to port of this country and using his pleasure yacht in coastwise voyages. He has every advantage he would have had if the yacht had been built in this country.

It is doubtful what tonnage he would have to pay under section 4219. Referring to Treasury decision No. 3938, where the section is digested, we find that vessels not built in the United States, but belonging to citizens of the United States, and provided only with a sea-letter or other custom-house document proving the vessel to be American property, pay 80 cents per ton each year, whereas vessels built in the United States pay 30 cents per ton. For a vessel of this size, the tonnage per year would therefore amount to something like $100, whereas a duty assessed upon the vessel as an imported article would amount to about $30,000.

It has been decided by Judge Benedict that a yacht of this character is exempt from the payment of what are known as light or tonnage duties under section 4226, because the vessel has on board a document showing it to be American property. See ———. The result is that this vessel pays but a very little more of tonnage tax than if she were wholly constructed within the United States. The difference could not be in the slightest degree a protection to builders of ships in this country. With all the safeguards and protection which Congress has *ex industria* afforded to the shipbuilding interests of this country, it is not to be supposed that it was intended to allow foreign-built yachts to be imported into this country, and to be used here in the same manner as domestic yachts are used, without the payment of a substantial tax. Pleasure yachts are luxuries in their use, while they afford occupation and profit to the builders in their construction. Upon articles of this character it has always been the policy of the legis-

lature to impose a tax. When, therefore, it is merely a matter of construction, this policy should lead the court to place imported pleasure yachts among the taxed articles and not among those exempted.

WM. H. TAFT,
*Solicitor-General.*

DEC. 14 1891
JAMES H. McKENNEY,
CLERK.

# In the Supreme Court of the United States.

OCTOBER TERM, 1891.

EX PARTE, IN THE MATTER OF J. SLOAT FASSETT, PETITIONER. No. 10, Original.

## PETITION FOR PROHIBITION.

MEMORANDUM OF THE UNITED STATES ATTORNEY, USED IN THE COURT BELOW.

Office Supreme Court U. S.
FILED
DEC 14 1891
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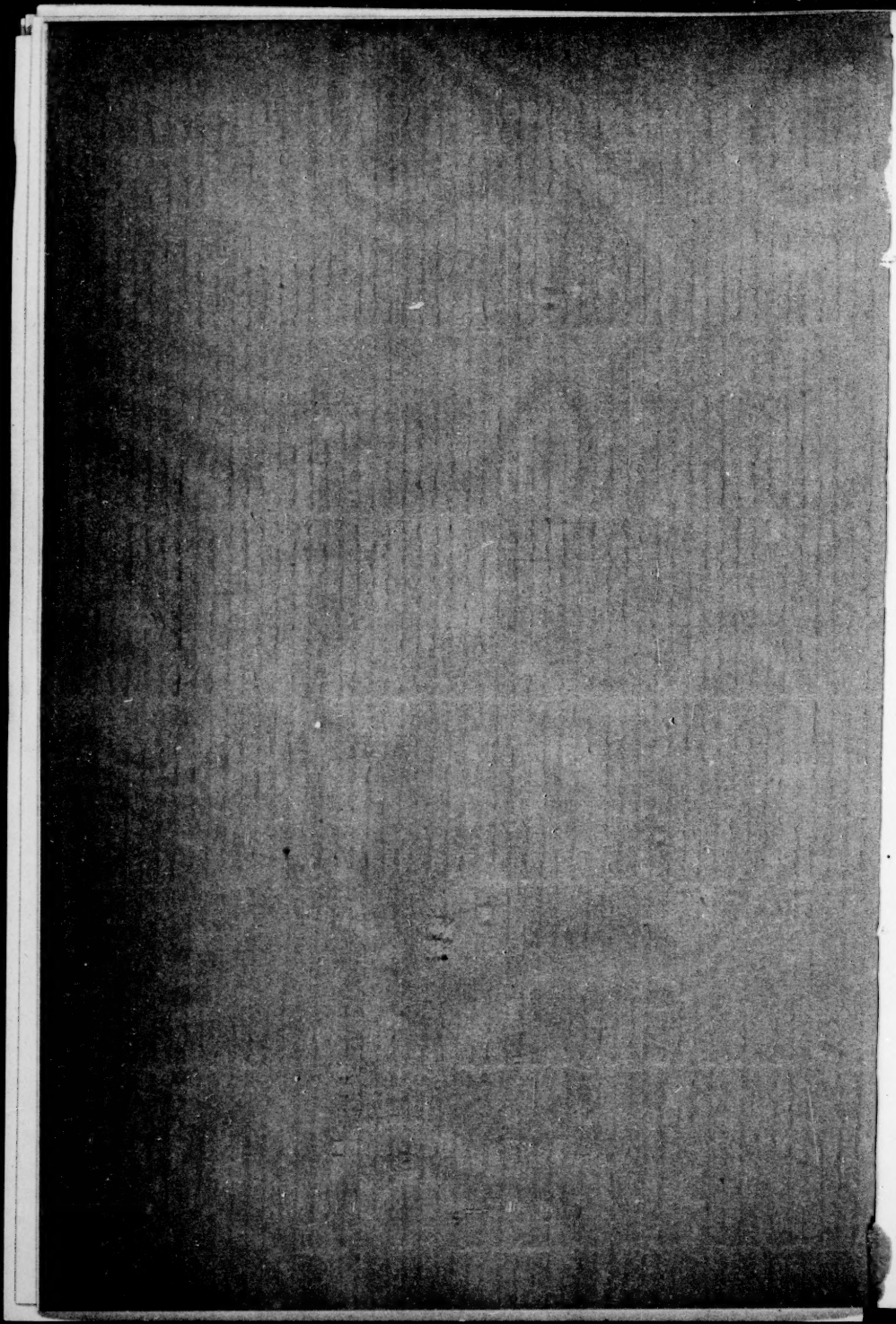

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## PETITION FOR PROHIBITION.

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### MEMORANDUM OF THE UNITED STATES ATTORNEY, USED IN THE COURT BELOW.

In view of the somewhat hurried preparation of the brief already filed in this case on behalf of the United States, it is thought best and proper to file also a copy of the brief which was submitted in the court below upon an issue presenting practically the same question, prepared by United States Attorney Mitchell and Assistant United States Attorney Platt.

WILLIAM H. TAFT,
*Solicitor-General.*

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

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FREDERICK W. VANDERBILT
*vs.*
THE YACHT CONQUERER, ETC., AND J. Sloat Fassett. } In admiralty.

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**MEMORANDUM OF UNITED STATES ATTORNEY IN OPPOSITION TO LIBELLANT'S MOTION FOR AN ALIAS PROCESS.**

The question upon this motion is as to the jurisdiction or power of the court in admiralty to take away from the collector of customs at the port of New York the possession of the pleasure yacht *Conqueror*, which has been taken and is detained by said collector for the enforcement of the payment of duties thereon under the revenue laws of the United States as an article imported from a foreign country.

I.

The tariff act of October 1, 1890, provides for the levying, collection, and payment of duties upon "*all articles* imported from foreign countries," etc., which are by the schedules and paragraphs therein respectively prescribed.

Section 4 of said act provides for the levying, collection, and payment of duties on the importation of *all articles*, manufactured in whole or in part, not provided for in this act.

No articles imported from a foreign country are intended to be free of duty, unless placed upon the free list in said act.

In *Junge* vs. *Hedden* (38 Fed. Rep., 197, 198), Lacombe, J., says:

> What, then, does the word "article" mean? Is it to be restricted to manufactures, to articles put in condition for final use, or is it not? The ordinary definition of the word "article" is an extremely comprehensive one. In the primary meaning, as given in the dictionaries, it designates one thing of many, one item of several, a portion of a complex whole. The best source, however, to which we should apply to determine the definition of a word used in a statute is the statute itself. It is not to be assumed that the same word is used in the statute with two different meanings, unless that is made clearly apparent by the connection in which the word is used. In section 2500 of the Revised Statutes, which is part of the tariff law, the word "article" is used as comprehending a growth, a product, or a manufacture. Section 2502, which prescribes duties, begins: "There shall be levied, collected, and paid upon all articles imported from foreign countries," and then follows an enumeration from the crudest raw material to the most finished work of human industry. The free list, section 2503, also begins: "The following articles, when imported, shall be free from duty." It seems, then, from the act itself that the

word "articles" is used in a broad sense; that it covers equally things manufactured, things unmanufactured, and things partially manufactured.

Within the above definition of the word "article" or the words "all articles," as used in the tariff act, the pleasure yacht *Conqueror* would clearly be included.

Was this "article" imported?

To constitute an importation within the meaning of the Customs laws it is necessary that there should be an arrival from a foreign country within the limits of a port of entry.

There is no dispute as to the facts.

The libel gives the history of this pleasure craft.

It was manufactured in a foreign country, purchased in a foreign country by a citizen of the United States, and brought within the limits of the port of New York for the use of its owner.

American-built yachts are not required to enter or clear at the custom-house. (Rev. Stat., 4214.)

Yachts belonging to a foreign yacht club have the like privilege. (Rev. Stat., 4216.)

Such foreign yachts coming here under a foreign flag are not imported. But the *Conqueror* does not stand on this footing. She is no longer a British yacht, nor yet is she a yacht of the United States. (See Rev. Stat., 4216.)

The act of her owner has denationalized her. His act was followed by hoisting the United States flag.

His intention was, therefore, clear. It was, by his act in obtaining a certificate on his bill of sale that she was the property of a citizen of the United States, to have the

protection of the United States flag over his yacht as property, and as his property.

His acts show his intention to import, not to claim any privilege under section 4216.

He could have sailed under foreign colors, as a yacht belonging to a foreign yacht club, but he has elected to import, and is not entitled to claim any privilege under section 4216. He claims the protection of the United States flag over his imported property, as a citizen of the United States.

His yacht is a vessel without a country and without ship's papers. It is an article imported from a foreign country.

This yacht has no standing as a vessel. A denationalized vessel has no individuality as a vessel, but is only a chattel. (See sec. 18, act of October 1, 1890.) A human being in former days could be imported as a slave, and was liable to duty as a chattel. (*People* v. *Compagnie General Transatlantique*, 107 U. S., 59; 2 S. C. Rep., 87.) The definition of a chattel includes every kind of property except the freehold. (See Webster's Dictionary.) Congress defined the meaning of merchandise in section 2766, United States Revised Statutes, to include "goods, wares, and chattels of every description capable of being imported."

The definition of the word "import" is mentioned as "opposed to export." (See Webster's Dictionary.) Anything capable of being exported can be imported. Congress has provided expressly for drawback on vessels built in the United States for foreign account, *when exported*, thus showing the understanding of the law-mak-

ng power that a vessel is the subject of export. Why not of import? (See Vol. 23, United States Statutes at Large, page 57. Laws of 1884, section 17, chapter 121.)

Moreover, the certificate which the libellant procured to be indorsed on the bill of sale of the yacht showed his intention to import the yacht into this country for his own use as one of the citizens thereof.

There is no statute of the United States or principle of law which requires an entry to be made to render an importation complete. (*Perots* vs. *United States*, Pet. Ct., 256; *United States* vs. *Dodge*, Deady, 124.)

The yacht was therefore imported, and is an "imported article."

II.

The learned counsel for the libellant seems to think that the act of the collector, under direction of the Secretary of the Treasury, in levying duties upon this pleasure yacht is a "change in the policy of the country" and is "revolutionary."

But the Treasury Department has frequently decided that such vessels are subject to duty as articles imported from a foreign country. S. S. 4960 granted free entry to the yacht *Madge*, although imported on the deck of a vessel, because she belonged to the Royal Yacht Club of Great Britain and was brought to the United States for racing purposes. Subsequently she was sold to a citizen of the United States, and, under instructions from the Department of March 17, 1882, duty was collected from the purchaser.

On July 30, 1885 (S. S. 7084), free entry was refused for a steamboat, with nets and other equipments as tools

of trade of a person engaged in the fishing business, arriving in the United States.

On December 22, 1886 (S. S. 7937), free entry was refused a yacht 40 feet in length, 6½ feet in breadth, and 2½ feet in depth.

On June 14, 1888 (S. S. 8901), the Department held that the *Nautilus*, a small steam yacht arriving at this port from Canada via canal and Hudson River, was a regular importation of a foreign-built vessel, and subject to the payment of duty. The fact that she propelled herself was held to have no bearing on her dutiable character.

On August 8, 1888 (S. S. 8975), the Department held that the *Geneva*, a steam ferryboat, which had been running under her foreign papers for nine years, after an act of Congress was passed granting her an American register was subject to duty as an imported article, and refused free entry of her machinery, although it was of American manufacture, holding that it had lost its identity as machinery and had become identified with the vessel as one of her parts.

United States Statutes at Large, Volume 20, chapter 193, page 473, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Treasury be, and he hereby is, authorized and directed to grant an American registry to the Canadian steam ferryboat *Geneva*, now owned by B. W. Folger and H. M. Folger, citizens of the United States, and residing at Cape Vincent, New York, upon the payment into the United States Treasury of the duties legally chargeable upon said vessel.

This act in itself is a declaration by the lawmakers that all denationalized vessels purchased by American citizens shall, upon their arrival in the United States, be considered as importations of foreign-built vessels, and duty assessed accordingly. (See also S. S. 4287 and 4481.)

If the libellant had desired to build a yacht in this country, where employment would have been given to American mechanics, and had wished to import the materials or a part of them from a foreign country, he could not have done so without payment of duty on such importation.

Then, upon what principle of logic or justice can he be permitted to import a pleasure yacht constructed and completed in a foreign country, by foreign workmen, of foreign materials, without payment of duty? The legislative intention that would lead to a conclusion so manifestly absurd should be clear and unequivocal.

## III.

Upon the arrival of any imported article from a foreign country into the port of New York the collector of customs is made by law the person to determine its dutiable character.

Section 14 of the act of June 10, 1890, entitled "An act to simplify the laws in relation to the collection of revenues" provides that the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except

duties on tonnage), shall be final and conclusive against the persons interested therein.

This jurisdiction and power of the collector of customs is an exclu-ive one. It is made final and conclusive, unless an appeal, after payment of duties and protest, is made to the board of three general appraisers, as provided in said action of said act.

Section 15 of said act also provides for an appeal from the Board of General Appraisers to the United States circuit court. So that Congress has provided a particular and exclusive mode or manner of review of the decisions of the collector in revenue matters.

The collector's decision is, under the law, final and conclusive, unless the importer avails himself of the exclusive mode of reviewing the collector's decision prescribed by the customs administrative act of June 10, 1890. The case, therefore, is one of revenue and not of admiralty jurisdiction. The correctness of the collector's decision is not open to review in a court of admiralty.

## IV.

By section 25 of the said act of June 10, 1890, it is provided that no collector or other officer of the customs shall be in any way liable to any owner, importer, consignee, or agent of any merchandise, or any other person, for or on account of any rulings or decisions as to the classification of said merchandise, or the duties charged thereon, or the collection of any dues, charges, or duties on account of said merchandise or any other matter or things as to which said owner, importer, consignee, or agent of

such merchandise might under this act be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided for in this act.

V.

The law imposes the duty upon the collector, in case of the failure to enter imported articles within fifteen days after the report of arrival, to take possession of and to detain same until the duties are paid, and if not paid within a year to sell the same for duties. (U. S. Rev. Stat., secs. 2785, 2963, 2964, and 2973.)

VI.

The collector of customs is now in lawful custody of this pleasure yacht as an imported article from a foreign country under the revenue laws of the Uniten States. And it is respectfully submitted that a court of admiralty has no jurisdiction to take away that lawful possession merely by reason of the fact that the imported merchandise or article in this case is a pleasure yacht or vessel. Until the tribunals provided for by the laws of the United States to determine the disputed question as to the classification or dutiable character of the imported article, to wit, the Board of General Appraisers and the United States circuit court, have decided the question at issue adversely to the collector, a court of admiralty has no jurisdiction to take away the possession of such merchandise from the collector.

Section 934 of the United States Revised Statutes makes all property taken or detained by any officer or other person

under authority of any revenue law of the United States irrepleviable. (The word "irrepleviable" is here used in its ordinary broad and comprehensive meaning and not in any technical sense.) It is deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. The only courts having jurisdiction over such property in custody of the collector for revenue purposes are the tribunals specified by law as having jurisdiction of the subject-matter.

Being in the custody of the law, the conclusion in the libel that the vessel has been wrongfully taken possession of and detained is not supported by any allegation of fact, and is not sufficient to give this court jurisdiction.

Until the determination of the question of duties by the tribunals for that purpose exclusively provided by law, this proceeding in admiralty is premature, and the court has no jurisdiction.

## VII.

While it is true, as contended for by counsel for the libellant in his brief, that "no man in this country is so high that he is above the law," it is equally true that where Congress, as in this case, has provided an exclusive remedy, the remedy provided by the law must be sought.

The collector does not claim to be above the law. He is seeking to enforce the law under instructions of the Secretary of the Treasury.

The *Conqueror* is a pleasure yacht of foreign build, brought by the owner from a foreign port into this coun-

try. He has never paid any duty on this article imported from a foreign country, and accordingly the collector, acting under the law and under instructions from his superior officer, has taken and detained the vessel in his custody. The collector does not hold the vessel subject to forfeiture, nor has there been any seizure for forfeiture; but the property is detained by him under the law merely with the view of obtaining the duties, which, as he is advised, should be paid.

VIII.

The libellant contests the right to detain the vessel, and his proceedings herein against the yacht and the collector are virtually against the collection of duties on property now held for duties as an article imported from a foreign country.

IX.

Numerous cases of seizure for forfeiture may be cited where the proceedings have been entertained in admiralty. Not only where the suit is instituted by the Government, but also where the suit is brought by an individual claiming an unlawful seizure, the admiralty court is the proper tribunal. "If the seizure be unlawful, the party has his redress by a suit *in personam* in admiralty. The jurisdiction in this class of torts is coextensive with the jurisdistion of the seizure." (Benedict's Admiralty, paragraph 303.)

This case, however, is quite different from those over which admiralty takes jurisdiction. As appears from the

authorities cited below, the limit of admiralty jurisdiction in matters of the revenue is the class of cases arising from seizures for forfeiture. This case is within the rule laid down in a series of decisions in proceedings for the recovery of duties; for, as appears from the clause just cited from Benedict, the jurisdiction of a suit brought by a party to contest an act of the Government under the customs laws is coextensive with the jurisdiction of the act contested.

That the act of the collector in the case of the *Conqueror* is not a matter for the admiralty court, see Benedict's Admiralty, paragraph 303*a*; Henry's Admiralty, p. 80; Etting's Admiralty, pp. 80, 81; Elmes' Law of the Customs, paragraph 37; *United States* vs. 350 *Chests of Tea*, 12 Wheat., 485, p. 498.

The revenue jurisdiction of the district courts proceeding *in rem* extends only to cases of seizure for forfeiture under United States laws for impost, navigation, or trade, and so United States can not proceed in admiralty to enforce a lien for duties. (The *Waterloo*, 1 Blatch. & H., 114, pp. 120–121; *United States* vs. 500 *Boxes of Pipes*, 2 Abb., 500.)

X.

The cases cited upon the brief of the counsel for the libellant do not cover the case at bar.

A few of them are below stated, as examples of all. There is no reported case holding that a court of admiralty has jurdisdiction in a case where facts correspond with the facts here.

The *North Cape* (6 Bliss, 505) was a suit against the State tax collector, who was holding the vessel for a local tax. The strongest statement in favor of the libellant is that at the bottom of page 507, but it is very general and does not pretend to lay down an absolute rule. This statement by the judge is largely qualified by his remark at the bottom of page 508, where he rests the question of jurisdiction on the ground that a possessory suit in admiralty will lie where replevin is maintainable at common law. Judge Blodgett here supports the jurisdiction of admiralty on the ground that replevin could have been sustained in common-law proceedings. It may be argued that in the case of the *Conqueror* replevin could not be brought, and therefore a possessory suit in admiralty, which is the same as replevin at law, should not be entertained. (See U. S. Revised Statutes, sec. 934; *Treat* vs. *Staples*, 1 Holmes, 1.)

In *United States* v. *Peters* (5 Cranch, 115) the statement cited refers to the interpretation of the constitutional amendment in regard to suits brought against the State. The State was not a party, and it was held, as quoted on the libellant's brief, that the mere suggestion of an interest in the State did not prevent jurisdiction. The dictum is quite inapplicable.

*Osborn* v. *United States Bank* (9 Wheaton, 870) was a bill in equity, filed by the officers of the United States Bank against the auditor of the State of Ohio, praying for an injunction against the levying of a tax on the bank. The defendant set up that he was an officer of the State, so that the State was a party, and therefore the case was within the constitutional amendment in regard

to suits against the State. Held, that this conclusion of the defendant was insufficient to bar the progress of the suit.

The case does not at all resemble the question here.

In *Slocum* v. *Mayberry* (2 Wheaton, 1) the goods in question were on board a vessel seized for a supposed violation of the embargo act. "The cargo remained in the custody of the officer simply because it was placed in a vessel which is in his custody." It is there said: "Had this action been brought for the vessel instead of the cargo the case would have been essentially different."

To make that case analagous in any respect to the case of the *Conqueror* the suit should be for some of Mr. Vanderbilt's wearing apparel left on board the yacht, and the detention of the yacht should be a regular seizure.

*United States* v. *Lee* (106 U. S., 218, 219, 220, 223) was a case where the point in issue was whether a suit against a Government officer was equivalent to a suit against the Government. The passages quoted from the libellant's brief show a state of facts quite at variance with those in the case of *Conqueror*. The court says that the argument was "that however clear his right, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States claiming to act under its authority."

In the case of *Conqueror* an adequate method of redress is provided by law. The whole drift of the extracts from the case of *United States* v. *Lee* is to the effect that there ought to be some way of reviewing the decision of a Government officer. In regard to this point there is practically no dispute.

XI.

The libellant's counsel in supposing a case in his brief that if the collector should forcibly take possession of Mr. Mitchell's house, that Mr. Mitchell could have some legal remedy, is concededly correct. But if the house was made in and imported from a foreign country, and the collector took it and detained it for payment of duties, then Mr. Mitchell would have to pay the duties under protest, and take his appeal to the board of appraisers, and proceed in the manner provided by law if he expected to obtain any redress.

XII.

The objection raised in the libellant's memorandum to making an entry of this imported article seems to be of no weight.

If the libellant had to make his entry as prescribed by the collector in order to obtain possession of his property he would not be estopped from thereafter claiming that his imported article was not dutiable by reason of any statement made upon the entry, because it would be an act done under duress and in order to obtain the possession of his property.

XIII.

The court should not grant the motion for an alias process. Revenue questions should be left to revenue courts. If the question of liability to duty is doubtful, this jurisdiction ought not to be invoked or exercised to determine it.

A court of admiralty should not interfere to obstruct an officer of the revenue in the performace of his public and statutory duty. (Opinion Attorney-General, February 24, 1888, S. S. 8813.)

XIV.

And even if it could be held to be, in any view, a case in admiralty, the process should not issue. (U. S. Rev. Stats., sec. 934; *Harmer* vs. *Dennie*, 3 Peters, 392; *Taylor* vs. *Carryl*, 20 How., 583.)

The revenue laws of the United States should not, as a matter of public policy, be rendered nugatory and incapable of enforcement by resort in a collateral action or proceeding to a court of admiralty.

From the moment of the arrival in port of the imported article it is, in contemplation of the revenue laws, in the custody of the United States, and every proceeding which interferes with or obstructs or controls that custody is a virtual violation of such revenue laws. The acts of Congress recognize no such authority and admit of no such exercise of right.

The prompt collection of the revenue, and its faithful application, is one of the most vital duties of government. Depending, as the Government does, on its revenue to meet its obligations, it is of the utmost importance that it should be collected with certainty and dispatch, and that the officers of the Treasury should be able to make a reliable estimate of the means to meet liablities. It would be difficult to do this if the revenue laws are to be obstructed or rendered nugatory by suits or proceed-

ings prosecuted in other than revenue courts. To guard against such consequences Congress has from time to time passed laws on the subject of the revenue, which not only provide for the manner of its collection, but also point out a way in which errors, if any, can be corrected. These laws constitute a system which Congress has provided for the benefit of those persons who complain of illegal assessments or illegal exactions of duties.

The mischiefs that would result if the aggrieved party could disregard those provisions of law, designed expressly for his security and benefit, and invoke the powers of other courts of other jurisdiction, forbid the idea that Congress intended to allow any other modes to redress a supposed wrong in the operation of the revenue laws than such as are particularly given by those laws. Cases arising under revenue laws not within jurisdiction of Court of Claims. (*Nicholl* v. *United States*, 17 Wall., 122.)

XV.

The motion for alias process should be denied.

EDWD. MITCHELL,
*United States Attorney.*
HENRY C. PLATT,
*Assistant United States Attorney.*

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# Supreme Court of the United States.

OCTOBER TERM, 1891.

**No. 10, Original.**

IN THE MATTER
*of*
J. SLOAT FASSETT,
*Petitioner.*

*Petition for Writ of Prohibition to the District Court of the United States for the Southern District of New York.*

# BRIEF.

**SUBMITTED ON BEHALF OF THE LIBELLANT IN THE DISTRICT COURT IN OPPOSITION TO THE PETITION.**

ELIHU ROOT,
SAMUEL B. CLARKE,
*Of Counsel.*

Evening Post Job Printing House, New York.

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| | |
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BRIEF SUBMITTED ON BEHALF OF THE LIBELLANT IN THE DISTRICT COURT IN OPPOSITION TO THE PETITION.

Inasmuch as the rule to show cause is directed only to the Judge of the District Court, and the petition does not controvert any of the facts stated in the verified libel in that Court, but asserts "that the facts stated in the said libel do not constitute a civil cause of admiralty and maritime jurisdiction," we shall assume in the argument which we are permitted to make in opposition to the petition, that the case here is to be determined upon the facts presented to the District Court by the libel exhibited there.

The libel shows that the *Conqueror* is a seagoing steamship of upwards of two hundred and thirty tons burden; that she is a pleasure yacht; that she was built in Glasgow in 1889, and purchased by the

libellant, an American citizen, in May, 1891; that in June, 1891, the libellant caused her to be navigated by her master to Halifax and thence to the United States; that she arrived in the port of New York on or about July 6, 1891, and was then duly entered as a vessel by her master; that the Collector at that time levied "light money" upon her under R. S., Sec. 4225; that the Collector recorded the bill of sale and returned it to the master with a certificate that the sale was effectual in form and substance, and that the owner is an American citizen; that on August 27, 1891, in the harbor of New York, Collector Fassett, the petitioner here, without the consent and against the will of libellant, forcibly took possession of the yacht, claiming her to be an imported article liable to duty under the Customs Revenue Laws.

The libel alleges that the yacht is not an imported article and denies the Collector's authority to take possession of her as such, and it prays that the yacht may be restored to the libellant, and that he may recover his costs and damages from Collector Fassett personally.

The libel proceeds upon the idea that if the yacht is not an imported article the Collector's act was tortious, and that, the act having been committed on the navigable waters of the United States, the District Court as a Court of Admiralty has jurisdiction to compel restitution in a cause of possession.

The principal question presented by the libel for the determination of the District Court, constituting the subject matter of the suit, is: *Is the yacht an imported article within the meaning of the Customs Revenue Laws?*

The return of the District Judges to the rule of this Court shows that they have not passed finally upon this question. All that they have done is to determine it provisionally in favor of the libellant so far as was necessary for the purpose of issuing process and getting control over the yacht so that the

question might be raised formally in the usual orderly way. Nothing has been done except the issuance of process, as of course, out of the Clerk's office on the filing of the libel; the Marshal's return of the process executed as to Mr. Fassett personally, and wholly unexecuted as to the yacht; the hearing by Judge Benedict of a motion by the libellant for alias process and the granting of the motion; the return of the alias process by the Marshal doubtfully executed; the hearing by Judge Brown of a motion by the libellant for further process, and the granting of further process with a specific order that the Marshal execute it by taking full and exclusive possession of the yacht; the return by the Marshal of the last process executed; the appearance by the District Attorney for Mr. Fassett personally and as late Collector, and for Mr. Hendricks as present Collector, and the filing of claims and answers.

## The Questions presented by the Petition for the determination of this Court.

It might be argued with some plausibility that the only questions here are: (1) Whether in a strict sense the District Court has jurisdiction of the subject matter of the libel, that is, whether it is authorized to decide the question above stated; (2) whether it is authorized to take the yacht into its custody for the purpose of acquiring jurisdiction of the *res*, so that it may take that question into consideration and make an effectual decree according to the conclusion which it reaches thereon; and that if this Court decides these questions against the petitioner it must deny him a writ of prohibition.

We believe, however, that this is too narrow a view of the authority of this Court over the District Courts sitting in admiralty, and that if this Court can see that the District Court either ought to decide the

merits of the case as presented by the libel against the libellant, or on any principle of law ought to refuse to consider the merits, it may issue the writ prayed for.

We think that the power of this Court should be as extensive as this in matters that may affect the country's relations with other nations, or that may concern so important and vital a thing as the collection of the country's revenues; and from a comparison of the decisions of this Court in the cases of *United States* vs. *Peters*, 3 Dallas, 121; *L'Invincible*, 1 Wheaton, 238; and *Glass* vs. *The Betsey*, 3 Dallas, 6, and from the decision *In re Baiz*, 135 U. S., 403, we infer that the power of this Court is in reality so extensive.

The situation, as we view it, is this: If the yacht is an imported article within the meaning of the import tariff laws, or if for any reason it is to be deemed such an article, the Collector has exclusive jurisdiction in the first instance to determine what, if any, duties are due thereon, and is authorized by law to compel an entry of the yacht as an imported article, for the purpose of such determination, and the District Court ought to be prohibited from interfering with him. If, on the other hand, the yacht is not an imported article, then the Collector was a wrongdoer in taking it by force from the owner, and, that act having been committed on navigable waters, the District Court, as a Court of Admiralty, is authorized to take the yacht away from him and restore it to its owner. There is no middle ground. The cardinal question which the libel calls upon the District Court to decide is something more than the subject matter of the suit. It is that; but it is also a question upon the solution of which the District Court's own jurisdiction depends. If we are right in this view, it follows that the application for prohibition requires this Court to determine that question.

## First Point.

**The forcible taking of the *Conqueror* on navigable waters, if without warrant of law, was a marine tort cognizable, in a cause of possession in admiralty, by any District Court which finds the yacht within the territorial limits of its process.**

Constitution, Art. III., Sec. 2.

R. S., Sec. 563.

Slocum *vs.* Mayberry, 2 Wheaton, 1 (Dictum by Marshall, *C. J.*)

*The North Cape*, 6 Biss, 505. (Vessel seized by State Tax Collector.)

*The J. W. French*, 13 Fed. Rep., 916. (Sheriff holding under void process issued from State Court).

*The Haidee*, Stew. Vice-Adm. Cases (Quebec) 23. (Vessel taken by constable under void process.)

Matter of Blanchard, 2 Barn. and Cr., 249 (King's Bench on application for prohibition).

*The Beatrice* (otherwise *Rappahannock*), 36 L. J., Ad. 9 (per Dr. Lushington).

*The Telegrafo*, L. R., 3 P. C., 686.

Burke *v.* Trevitt, 1 Mason, 96 (Court's control over seized property when seizor does not institute a forfeiture suit).

*L'Invincible*, 1 Wh., 238 (authority of armed vessels to make captures at sea examinable).

*Santissima Trinidad*, 7 Wh., 283.

Betts Adm. Pr., p. 19.

Benedict's Admiralty, Sec. 311.

Williams & Bruce Adm. Pr., p. 21 (2 Eng. Ed.).

## Second Point.

**The taking of the *Conqueror* by the Collector was without warrant of law.**

I.

*The Collector does not hold any general warrant to take private property. His lawful authority is limited to imported articles.*

(*A.*) A moment's reflection is enough to show how anomalous and startling a thing it would be if there were no limits to the Collector's authority.

> Suppose that the liquidated duties on imported goods have been paid, or legally tendered, but the Collector disputes the fact of payment or the validity of the tender, and refuses to deliver the goods to the owner. Is this an act within his authority?
>
> Or suppose the Collector to be advised by some ingenious Solicitor of the Treasury that the whole fleet of seagoing vessels by which the international trade of the country is carried on, are imported articles within the fair intendment of the Customs laws and he thereupon takes possession of every vessel which has entered his port from a foreign country and holds it for duties. Can he lawfully do this?
>
> Or, suppose he puts his officers into possession of somebody's dwelling-house and holds it for duties.

(*B.*) Evidently the notion of the Collector's power being unlimited is not readily to be accepted. The statutes which confer upon him all the power which he has, must be scrutinized to ascertain whether

they warrant such a conclusion, and if they do not, to ascertain where the line separating the things which he may lawfully do from the things which he cannot lawfully do, is drawn.

(*C.*) There is no question here as to the Collector's authority under the laws relating to commerce and navigation or under penal laws of any kind prescribing penalties or forfeitures. Article VII. of the libel alleges that the *Conqueror* was not seized under any claim of authority therefor given by any provision of the laws of the United States relating to commerce and navigation or of any law of the United States providing a penalty or forfeiture, and that Mr. Fassett took possession of the *Conqueror solely* upon the claim that, the duties accruing upon her importation being unpaid, he was entitled to take and keep her in safe custody till such duties should be paid or secured in the manner provided by law for articles imported into the United States. This article of the libel is admitted by the answers put in on behalf of Mr. Fassett personally and as Collector. And the claim to the possession of the vessel put in by Mr. Hendricks, the present Collector, is based on the ground alleged in this article as the ground under which Mr. Fassett took possession of the yacht.

(*D.*) The statutes, under which the Collector is authorized to take possession of property to enforce the payment of import duties thereon, are as follows:

> Initial paragraph of the present Import Tariff (Act of October 1, 1890): "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that on and after the sixth day of October, eighteen hundred and ninety, unless otherwise specially provided for in this act, there shall be levied, collected, and paid upon *all articles imported from foreign countries*, and mentioned in the schedules herein contained, the rates of duty

which are, by the schedules and paragraphs, respectively prescribed, namely:

R. S., Sec. 2621: "At each of the ports to which there are appointed a collector, naval officer and surveyor it shall be the duty of the collector: * * * *Third.* To receive the entries of all ships or vessels, and of the goods, wares and merchandise imported in them. *Fourth.* To estimate, together with the naval officer where there is one, or alone where there is none, the amount of the dues payable thereupon, indorsing such amount upon the respective entries. *Fifth.* To receive all moneys paid for duties and take all bonds for securing the payment thereof. *Sixth.* To grant all permits for the unlading and delivery of goods."

R. S., Sec. 2774: "Within twenty-four hours after the arrival of any vessel, from any foreign port, at any port of the United States established by law, at which an officer of the Customs resides, or within any harbor, inlet or creek thereof, if the hours of business at the office of the chief officer of the Customs at such port will permit, or as soon thereafter as such hours will permit, the master shall repair to such office and make report to the chief officer of the arrival of the vessel, and he shall, within forty eight hours after such arrival, make a further report in writing to the collector of the district, which report shall be in the form and shall contain all the particulars required to be inserted in, and verified like, a manifest. Every master who shall neglect or omit to make either of such reports and declarations, or to verify any such declaration as required, or shall not fully comply with the true intent and meaning of this section, shall, for each offense, be liable to a penalty of one thousand dollars."

R. S., Sec. 2785: "The owner or consignee of any merchandise on board of any such vessel, or, in case of his absence or sickness, his known agent or factor in his name, shall, within fifteen days after the report of the master to the collector of the district for which such merchandise

shall be destined, make entry thereof in writing with the collector, and shall in such entry specify the name of the vessel and of her master, in which, and the port or place from which such merchandise was imported, the particular marks, numbers, denominations and prime cost, including charges of each particular package or parcel whereof the entry shall consist, or, if in bulk, the quantity, quality and prime cost, including charges thereof, particularly specifying the species of money, in which the invoices thereof are made out. Such entry shall be subscribed by the person making it, if the owner or consignee, in his own name, or, if another person, in his name as agent or factor, for the owner or consignee. The person making such entry shall also produce to the collector and naval officer, if any, the original invoices of the merchandise, or other documents received in lieu thereof, or concerning the same, in the same state in which they were received, with the bills of lading for the same; which invoices shall be signed by the persons in the offices of the collector and naval officer who have compared and examined them."

R. S., Sec. 2869: "The collector jointly with the naval officer, if any, or alone where there is none, shall, according to the best of his or their judgment or information, make a gross estimate of the amount of the duties on the merchandise to which the entry of any owner or consignee, his factor or agent, shall relate, which estimate shall be endorsed upon such entry and signed by the officer making the same. The amount of the estimated duties having been first paid or secured to be paid, pursuant to the provisions of this title, the collector shall, together with the naval officer, where there is one, or alone where there is none, grant a permit to land the merchandise, whereof entry has been so made, and then, and not before, it shall be lawful to land the merchandise."

R. S., Sec. 2870: "All permits shall specify, as particularly as may be, the merchandise to be delivered, namely, the number and description of the packages, whether trunk, bale, chest, box,

case, pipe, hogshead, barrel, keg, or any other packages whatever, with the mark and number of each package, and, as far as circumstances will admit, the contents thereof, together with the names of the vessel and master, in which and the place from whence they were imported; and no merchandise shall be delivered by any inspector or other officer of the customs that does not fully agree with the description thereof in such permit."

R. S., Sec. 2963: "When *merchandise, imported into the United States, has not been entered* in pursuance of the provisions of any act regulating imports and tonnage, the same shall be deposited in the public warehouse, and shall there remain, at the expense and risk of the owner, until such invoice is produced. Nothing herein contained shall be understood to prohibit the sale of such quantities of merchandise so stored as may be necessary to discharge the duties thereon, and all intervening charges, at the time or times when such duties shall become due and payable."

R. S., Sec. 2964: "*In all cases of failure or neglect to pay the duties within the period allowed by law to the importer to make entry thereof*, or whenever the owner, importer, or consignee shall make entry for warehousing the same, in writing, in such form and supported by such proof as shall be prescribed by the Secretary of the Treasury, *the merchandise shall be taken possession of by the collector*, and deposited in the public stores, or in other stores to be agreed on by the collector or chief revenue officer of the port, and the importer, owner or consignee, such stores to be secured under the joint locks of the inspector and importer, there to be kept, with due and reasonable care, at the charge and risk of the owner, importer, consignee, or agent, and subject at all times to their order, upon payment of the proper duties and expenses, to be ascertained on due entry thereof for warehousing, and to be secured by a bond of the owner, importer, or consignee, with surety to

the satisfaction of the collector, in double the amount of the duties, and in such form as the the Secretary of the Treasury shall prescribe."

R. S., Sec. 2973: "If any merchandise shall remain in public store beyond one year, without payment of the duties and charges thereon, except as hereinbefore provided, then such merchandise shall be appraised by the appraisers, if there be any at such port, and if none, then by two merchants to be designated and sworn by the collector for that purpose, and sold by the collector at public auction, on due public notice thereof being first given, in the manner and for the time to be prescribed by a general regulation of the Treasury Department. At such public sale, distinct printed catalogues descriptive of such merchandise, with the appraised value affixed thereto, shall be distributed among the persons present at such sale. A reasonable opportunity shall be given before such sale to persons desirous of purchasing, to inspect the quality of such merchandise. The proceeds of such sales, after deducting the usual rate of storage at the port in question, with all other charges and expenses, including duties, shall be paid over to the owner, importer, consignee or agent, and proper receipts taken for the same."

(*E.*) Under these statutes the only property which the Collector is authorized to take and hold is (1) imported articles which have not been entered; and (2) imported articles, the duties upon which have not been paid.

If he takes property which is an imported article that has not been entered or the duties upon which have not been paid, he acts within his warrant.

If he takes property which is not an imported article or which, being an imported article, has been entered and the duties thereon paid, he goes beyond his warrant and is a wrongdoer. He is in the position of a sheriff who, under a warrant to seize a horse has taken a cow.

(*F.*) The courts have frequently construed similar statutes to impose limitations upon the Collector's authority so that if he goes beyond the limits he becomes a wrongdoer.

In *The Apollon*, 9 Wheaton 362, it was held that Section 29 of the act to regulate the collection of duties on imports and tonnage, passed March 2, 1799 (1 Stats. p. 648), providing that it should be lawful for collectors to arrest and bring back to the ports of the United States any vessel which, having arrived within the limits of any district of the United States from a foreign port, should depart or attempt to depart from the same before report or entry by the master with the Collector of some district of the United States, did not authorize a collector to pursue and bring back a vessel which had passed up St. Mary's River to a Spanish port, that river then being the boundary between Spanish and American territory and its waters not being exclusively waters of the United States; and the Collector was held liable in damages in an *in personam* admiralty suit.

In *Slocum* vs. *Mayberry*, 2 Wheaton, 1; Slocum, Surveyor of Customs at the port of Newport, R. I., took possession of a vessel under orders of the Collector, pursuant to Section 11 of an act, which read as follows: "That the collectors of the customs be, and they are hereby respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever in their opinion the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the United States be had thereupon." The owners of the cargo laden on the vessel brought replevin therefor in the Supreme Court of Rhode Island, and the judgment of that Court in their favor was affirmed by this Court upon the ground that the authority given by the

statute respected the vessel only, the cargo being in no manner the object of the act.

In *Tracy* vs. *Swartwout*, 10 Peters, 80, a Collector was held liable in damages in an action at common law for having, without legal warrant, detained in his possession under instructions of the Secretary of the Treasury imported sugar cane syrup.

In *McLean* vs. *Hager*, 31 Fed. Rep., 602, the Circuit Court for the Northern District of California held that a Collector was liable in damages in an action at common law for having taken and held the possession of certain opium which had been shipped from Honolulu to Panama, by way of San Francisco, and had been transshipped without being landed in San Francisco; the ground of the decision being that the opium had not been *imported* within the meaning of the Customs Revenue Laws, and that the Collector's act was beyond his authority and therefore a trespass.

## II.

*The Conqueror is not an imported article within the meaning of the Collector's warrant.*

(A.) On the facts stated in the libel the yacht is plainly a sea going ship. It belongs to the class of things which in the statutes relating to commerce and navigation as well as in the statutes relating to imports, are described by the general term "vessels."

It falls under one or other of the provisions of the statutes relating to tonnage duties, viz.:

> R. S. Sec. 4219 (as amended in 1877, 19 Stats., p. 250). "Upon vessels which shall be entered in the United States from any foreign port or place there shall be paid duties as follows: On vessels built within the United States but be-

longing wholly or in part to subjects of foreign powers, at the rate of thirty cents per ton. On other vessels not of the United States at the rate of fifty cents per ton. Upon every vessel not of the United States, which shall be entered in one district from another district, having on board goods, wares or merchandise taken in one district to be delivered in another district, duties shall be paid at the rate of fifty cents per ton. Nothing in this section shall be deemed in anywise to impair any rights or privileges which have been or may be acquired by any foreign nation under the laws and treaties of the United States relative to the duty of tonnage on vessels. On all foreign vessels which shall be entered in the United States from any foreign port or place, to and with which vessels of the United States are not ordinarily permitted to enter and trade, there shall be paid a duty at the rate of two dollars per ton; and none of the duties on tonnage above mentioned shall be levied on the vessels of any foreign nation if the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nations, so far as they operate to the disadvantage of the United States, have been abolished. In addition to the tonnage duty above imposed, there shall be paid a tax, at the rate of thirty cents per ton, on vessels which shall be entered at any custom house within the United States from any foreign port or place; and any rights or privileges acquired by any foreign nation under the laws and treaties of the United States relative to the duty of tonnage on vessels shall not be impaired; and any vessel any officer of which shall not be a citizen of the United States, shall pay a tax of fifty cents per ton."

Section 14 of "the Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes," passed June 26, 1884 (23 Stats., page 57, as amended by the Act of June 19, 1886, 24 Stats., 81), viz.:

SEC. 14. "That in lieu of the tax on tonnage of thirty cents per ton per annum, imposed prior to July first, eighteen hundred and eighty-four, a duty of three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the Caribbean Sea, or the Sandwich Islands, or Newfoundland; and a duty of six cents per ton, not to exceed thirty cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from any other foreign ports, not, however, to include vessels in distress or not engaged in trade: Provided, that the President of the United States shall suspend the collection of so much of the duty herein imposed, on vessels entered from any foreign port, as may be in excess of the tonnage and lighthouse dues, or other equivalent tax or taxes, imposed in said port on American vessels by the Government of the foreign country in which such port is situated, and shall, upon the passage of this act, and from time to time thereafter as often as it may become necessary by reason of changes in the laws of the foreign countries above mentioned,

indicate by proclamation the ports to which such suspension shall apply, and the rate or rates of tonnage duty, if any, to be collected under such suspension; provided, further, that such proclamation shall exclude from the benefits of the suspension herein authorized, the vessels of any foreign country in whose ports the fees or dues of any kind or nature imposed on vessels of the United States, or the import or export duties on their cargoes, are in excess of the fees, dues or duties imposed on the vessels of the country in which such port is situated, or on the cargoes of such vessels; and Sections forty-two hundred and twenty-three and forty-two hundred and and twenty-four, and so much of Section forty-two hundred and nineteen of the Revised Statutes as conflicts with this section, are hereby repealed."

R. S. Sec. 4216. "Yachts, belonging to a regularly organized yacht club of any foreign nation which shall extend like privileges to the yachts of the United States, shall have the privilege of entering or leaving any port of the United States without entering or clearing at the Custom Houses thereof, or paying tonnage tax."

It is plainly liable to pay "light money" as a vessel "not of the United States," under R. S., Sec. 4225, viz.:

"A duty of 50 cents per ton, to be denominated 'light money,' shall be levied and collected on all vessels not of the United States, which may enter the ports of the United States. Such light money shall be levied and collected in the same manner and under the same regulations as the tonnage duties."

Unless it is exempt under the following provisions of Section 4226, namely:

> "The preceding section shall not be deemed to operate upon unregistered vessels, owned by citizens of the United States, and carrying a sea letter, or other regular document, issued from a Custom House of the United States, proving the vessel to be American property."

The Collector at New York levied light money on the *Conqueror* on her first entry at that port, and so treated her as a vessel.

She is also treated as a vessel in the instructions of the Treasury Department recited in the petition herein which designate her by the term "vessel," and direct the Collector to refer the question of her liability to tonnage duty to the Commmissioner of Navigation.

(*B.*) A sharp discrimination between vessels and imported articles is everywhere manifest in the statutes.

> Thus, by R. S., Sec. 337, Collectors are required, for statistical purposes, to keep distinct accounts of imported articles and of the national character and tonnage of all vessels which enter and depart from their districts.
>
> So, again, the provisions for "entering vessels" and for "entering imported articles" are distinct (as to vessels, see R. S., Sec. 2770–2774; as to imported articles, Sec. 2785 and Sec. 5 of the the Administrative Act of June 10, 1890).
>
> See also Section 2795 (sea stores of vessels).
> Sec. 2798 (steamship's stock of coal).
> Sec. 2806–7 (manifests of vessels).
> Sec. 2872 (unlading of vessels).
> Sec. 3059 (search of vessels).

See also generally R. S. Title 34, Chapter 4, entry of merchandise; Chapter 5 on unlading; Chapter 6 on appraisal; Chapter 7 on the bond and warehouse system; Chapter 10 enforcement of duty laws and punishment for violations; Administrative Act of June 10, 1890.

(*C.*) This discrimination has been maintained from the foundation of the Government, and is marked in several adjudged cases.

Compare the second, third and fifth acts passed by the first Congress; the Act laying duties on "Goods, Ware and Merchandises imported into the United States," passed July 4, 1789 (1 Stats. p. 24); the Act imposing tonnage duties "on all ships or vessels entered in the United States" (1 Stats. 27); the Act regulating "the Collection of the Duties imposed by law on the tonnage of ships or vessels and on goods, wares and merchandises imported into the United States" (1 Stats. 29).

In *The Gertrude*, 3 Story, 68, a British brig, while temporarily stranded on the Maine coast, was sold, and the purchaser hauled her off and brought her into Eastport. Her anchors, cables and rigging were taken ashore and sold. Forfeiture proceedings were instituted against the brig on the ground that goods, wares and merchandise imported by her into the United States had been unladen without a permit. One of the questions was whether those articles were goods, wares and merchandise imported into the United States within the true intent and meaning of the Revenue Laws. Ware, *J.*, in the District Court, held that they were not. In his opinion, which was adopted by Story, *J.*, in the Circuit

Court, it is said: "The rigging and apparel of a ship are a part of the ship, and therefore not merchandise in any other sense of the word than that in which the ship herself is. * * * The Revenue Laws in all cases contemplate a ship as a single object, and when it is subjected to any fiscal charge it is imposed under the name of a tonnage duty. The rigging, furniture and appurtenances are a part of the ship. * * * My opinion is that the materials and rigging of a foreign vessel cast upon our shore as a wreck, when landed and sold, do not come within the purview of the Revenue Laws as merchandise imported."

See also U. S. *vs.* A Chain Cable, 2 Sumner, 362.

(*D.*) The discrimination is implied in the following constitutional provisions:

(Article I., Sec. 10, Clause 2): "No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

(Article I., Section 10, Clause 3:) "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace," &c.

(*E.*) The fact that the yacht, being foreign built, is owned by an American citizen, does not take it out of the class of "vessels" and put it into the class of "imported articles." These facts make it

liable to burdens if it engages in either the foreign or the domestic trade of the United States; but, though it is a vessel subject to restrictions, it is none the less a vessel.

There is nothing whatever in any of the Statutes which shows that Congress intended that such a vessel should be treated as an imported article. On the contrary, the Statutes contemplate that just such vessels under the description of "vessels not of the United States" "entered in the United States from any foreign port" may be liable to tonnage duties (Sec. 4219); that just such vessels under the description of "yachts belonging to a regularly organized Yacht club of any foreign nation which shall extend like privileges to the yachts of the United States" may have the privilege of entering or leaving any port of the United States without entering or clearing at the Custom Houses thereof or paying tonnage tax (Sec. 4216); that just such vessels under the description of "vessels not of the United States" may be liable to light money (Sec. 4225); that just such vessels under the description of "vessels not of the United States," "owned by citizens of the United States and carrying a sea letter, or other regular document, issued from a Custom House of the United States, proving the vessel to be American property" may be exempt from light money (Sec. 4226); that just such vessels under the description of "unregistered vessels owned by a citizen of the United States, and sailing with a sea letter, going to any foreign country" may be furnished with a passport (Sec. 4308); that just such vessels under the description of "vessels which shall be wholly owned by citizens of the United States, and furnished with or entitled to sea letters or other Custom House documents," may be furnished with documents proving them to be the property of citizens of the United States (Sec. 4190).

The Treasury Department in Articles 93–97 of its general regulations under the Customs and Naviga-

tion Laws issued by Secretary Folger in 1884, recognizes the fact that foreign-built vessels, owned by citizens of the United States, are "vessels" and not "imports." These regulations are as follows:

*Undocumented Vessels wholly owned by Citizens of the United States.*

ART. 93. Foreign-built or denationalized vessels purchased and wholly owned by citizens of the United States, whether purchased of belligerents or neutrals during a war to which the United States are not a party, or in peace, of foreign owners, are entitled to the protection of the authorities and flag of the United States, as the property of American citizens, although no register, enrollment, license, or other marine document, prescribed by the laws of the United States, can be lawfully issued to such vessels.

ART. 94. To enable, however, the owners of a vessel so circumstanced, to protect their rights, if molested or questioned, the collector of the customs, though forbidden by law to grant any marine document or certificate of ownership, may lawfully make record of the bill of sale in his office, authenticate its validity in form and substance, and deliver to the owner a certificate to that effect, certifying, also, that the owner is a citizen of the United States.

These facts, thus authenticated, if the transfer was in good faith, entitle the vessel to protection as the lawful property of a citizen of the United States; and the authentication of the bill of sale and of citizenship will be *prima facie* proof of such good faith.

ART. 95. In all cases, therefore, where the evidence of the purchase of a foreign vessel by

a citizen of the United States, with proof of citizenship and of the *bona fide* character of the purchase, shall be furnished to a collector of the customs, he will, if the proof be satisfactory, and purchase deemed in good faith, record the bill of sale in his office, and deliver to the party the original with a certificate endorsed thereon in the following form:

FORM NO. 29.

CERTIFICATE UPON BILL OF SALE.

I, , collector of the customs for the port of in the State of in the United States of America, do hereby certify that the within bill of sale, bearing date of of the (here describe the vessel, her tonnage, denomination, name, &c.) sold and transferred by to is, in form and substance, valid and effective in law and has been duly recorded in my office; and that the said (meaning the owners) are citizens of the United States.

As witness my hand and seal this day of in the year of our Lord 18 .

[L.S.]

ART. 96. Before granting such certificate, the collector of the customs will require the tonnage of the vessel to be duly ascertained in pursuance of law, and insert the same in the description of the vessel in his certificate.

ART. 97. A separate record will be kept of these vessels, and in the tonnage returns they will be reported in a separate column under the

head of "Foreign-built or undocumented vessels owned by citizens of the United States."

This is no new thing. The grouping by the Treasury Department of "all ships and vessels belonging to citizens of the United States" in one class, whether they are technically "vessels of the United States" or not, goes back to Secretary Hamilton's Instructions to Collectors, of May 13, 1793. Those instructions, together with copies of the documents at that time customarily furnished to vessels belonging to citizens of the United States, may be found in a case decided by the Court of Errors in New York in 1807; *Sleght* vs. *Hartshorne*, 2 Johns., 531. That case also contains a review of the early statutes and treaties, which is thus summarized by Clinton, Senator, in the Opinion of the Court (pp. 544–546):

> "It has been the policy of the United States, in common with other commercial nations, to encourage their own ships. Our navigation act enumerates and describes certain vessels, and emphatically denominates them ships or vessels of the United States. Their distinguishing characteristics are, that they are built, owned, and commanded by citizens of this country. They are registered with the collector, and are entitled to a certificate, called a register. The register is of itself considered a competent document, to prove the ship American; and would, in most cases, serve as a sufficient protection against capture. But cases occur wherein this register is not granted to vessels owned by citizens of the United States. The principal case is where the vessel is built out of the country. In such case, the Collector cannot grant a register; but it being proper and necessary, that the owner should have some document to protect

his property against the rapacity of cruisers on the ocean, and to establish his neutrality, a formula has been devised, and is granted, called a certificate of ownership. With a view to the encouragement of ship building in this country, a discrimination is also made in the duties of tonnage. Ships of the United States pay at the rate of six cents per ton; ships built within the United States after a certain period, but belonging wholly or in part to foreigners, thirty cents per ton; and all other ships fifty cents per ton. Hence, under both heads, of ownership and the place of building, all vessels are considered, by our laws, under four distinct views: 1. Vessels of the United States. 2. Vessels built in the United States, owned by foreigners. 3. Vessels built out of the United States, owned by citizens. 4. Vessels built out of the United States, owned by foreigners. Vessels of the first and third classes, being owned by citizens, are entitled to the protection of the Government. The second and fourth classes, being owned by foreigners, cannot receive any documents which would in the least protect them from capture. To encourage our own ship building, vessels of the United States pay but a small duty of six cents. Vessels built and owned here by foreigners, pay a duty of thirty cents; and, if our citizens will go into foreign countries to build or to purchase vessels, they are put on the same footing as foreigners, owning foreign vessels, with regard to the rate of duties, although as citizens they have a right to demand the protecting hand of the Government, for their property. Hence arises the division of vessels owned by citizens, into two classes, vessels of the United States, or registered vessels, and vessels belonging to the citizens of the United States, certificated but not registered."

Against the opinion of the present Solicitor of the Treasury, delivered in the year 1891, we set the opinion of Secretary Hamilton in 1793, the opinion of Secretary Folger in 1884, and the uninterrupted practice of the Treasury Department for ninety-eight years.

(*F.*) The settled policy of our Government from the adoption of the Constitution until the present time has been to accomplish both the purpose of raising revenue and the purpose of protecting home industries in respect of vessels, by imposing upon them duties upon tonnage and not by taxing them as "imported merchandise."

This policy has been applied in respect of sea going vessels of every description, including as well foreign built vessels, owned by citizens of the United States, as other vessels.

The letter of Secretary Hamilton in 1793, the Act of March 2, 1803, 2 Stat., p. 208, the Act of March 26, 1810, 2 Stat., p. 568, and the facts portrayed in the above cited decision of the New York Court of Errors, in the case of Sleght *v.* Hartshorne, in 1807, show that the existence of a class of vessels to which the yacht *Conqueror* belongs, viz., foreign built vessels, owned by American citizens, was present in the minds of both the Legislature and the Executive, and that great difficulty was experienced in determining the precise rights and privileges which should be accorded to the owners of such vessels. The Treasury regulations of 1884, show that the same subject was before the Treasury Department at that time.

Vessels of this character were so frequently entering and departing from the ports of the United States as to call for *rules and regulations*, both by statute and by Executive action, yet never during the whole period in any of the numerous Tariff

Acts which have been passed can a word be found which indicates the intention to distinguish between that class of vessels and other vessels entering American ports by taxing them as imported merchandise.

*As to the raising of revenue:* the uniform and unvarying rule has been to raise revenue from imported merchandise by imposing upon it taxes either specific or ad valorem, and to raise revenue from vessels entering American ports by imposing upon them taxes measured in accordance with their carrying capacity.

*As to the protection of American ship building:* the uniform and unvarying rule has been to accomplish it in two ways:

1*st.* By imposing differential tonnage duties which discriminate against the vessels of American citizens built abroad equally with the vessels of foreigners built abroad, with the further discrimination against vessels owned by American citizens arising from the fact that foreign-built vessels owned by foreigners may be relieved from the discriminating duty by treaty or by Executive proclamation based upon the principles of reciprocity, while foreign-built vessels owned by Americans have no such opportunity of relief:

2*nd.* By prohibiting foreign-built vessels owned by American citizens from engaging in portions of the trade of the United States (*e. g.* Rev. Stats., Sec. 2497), thus putting them at a disadvantage not merely as against American-built vessels owned by American citizens, but at a disadvantage in comparison with foreign-built vessels owned by foreigners.

## III.

*The decision of the Collector, or rather of the officials of the Treasury Department, whose orders he obeyed, that the "Conqueror" is an imported article, does not make her so; nor does that decision in any way alter the legal quality of the Collector's act in taking possession of the yacht.*

(*A.*) Ordinarily, no judicial function is called into play in ascertaining whether articles have been imported or not. The matter is a thing to be *seen*, not *judged*.

Exceptional cases do, indeed, arise in respect of which judgment must be exercised: *e. g.* (1) Goods shipped from one foreign port to another by way of a port of the United States (*McLean* v. *Hager*, 31 Fed. Rep., 602); (2) Goods saved from a wreck at sea, brought into port and sold by a judicial decree for salvage (*Merritt* v. 1 *Package Mdse.* from the *Oregon*, 30 Fed. Rep., 195; 32 *Id.*, 111); (3) Appurtenances of ships, such as spars and cables which have been severed from the vessels to which they belong and sold (*The Gertrude*, 3 Story, 68). But in such cases usually, if not always, the question is one of pure law. There are no inferences of fact to be drawn, no difficult questions of the application of the law, when once it is ascertained, to the facts.

There is therefore no reason in the nature of the duties which the Collector is required to perform for regarding him otherwise than as a ministerial officer in respect of the matter of ascertaining what articles have been imported into his district. Ordinarily he will make no mistakes except such as a Sheriff or Marshal holding judicial process may make. If he errs in exceptional cases, his error is likely to be one of law, pure and simple. For such errors why should not he, like everybody else (except, of neces-

sity, judges of courts), be deemed responsible? If he takes property illegally, shall it be a justification for him to plead, "that said (property) is in his opinion liable to duty under the fair intendment of the Tariff Act"? Where, then, short of the Russian administrative system, is this sort of thing to stop? and what is to stop it?

(*B.*) There is no basis in the statutes for the idea that *in this matter* Congress intended to endow Collectors with a judicial or quasi judicial character.

The statutes authorize Collectors to receive entries of "imported articles;" to issue permits for the unlading of "imported articles;" to take possession of "imported articles" which have not been entered; to take possession of "imported articles" on which the duties have not been paid; to designate packages of "imported articles" for appraisal; to determine whether "imported articles" are exempt from duty under the free list, and if not exempt to determine under what clause of the duty laying schedules they fall, and generally to assess duties thereon; and to receive payment of the duties.

Some of these powers and duties within the contemplation of the statutes involve the exercise of judicial or quasi-judicial functions, but the ascertainment of what things are "imported articles" is not one of them. The boundary line of the Collector's jurisdiction is drawn at "imported articles." He ascertains that line in all cases at his peril.

It has been suggested that Sections 14, 15 and 25 of the Administrative Act of June 10, 1890, make a new departure in the tariff system in respect of the matter under consideration. It is said that, however it may have been under prior laws, the Collector's acts of whatever kind are now invested with the quality of decisions to the extent, at least, of rendering him free from personal liability therefor.

To determine what merit there is in this claim will require a close scrutiny of the sections mentioned, and we accordingly quote them in full:

> SEC. 14. That the decision of the Collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within ten days after, "but not before," such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges and exactions, if dissatisfied with such decision give notice in writing to the Collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption, shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the Collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which Board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the records shall be transmitted to the proper Collector or person acting as such who shall liquidate the entry accordingly, except in cases where an application shall be filed in the Circuit Court within the time and in the manner provided for in Section 15 of this Act.
>
> SEC. 15. That if the owner, importer, consignee or agent of any imported merchandise, or

the Collector or the Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in Section 14 of this Act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them may, within thirty days next after such decision, and not afterwards, apply to the Circuit Court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision. Such application shall be made by filing in the office of the Clerk of said Circuit Court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the Collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the Court shall order the Board of Appraisers to return to said Circuit Court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decisions thereon; and all the evidence taken by and before said Appraisers shall be competent evidence before said Circuit Court; and within twenty days after the aforesaid return is made, the Court may, upon the application of the Secretary of the Treasury, the Collector of the Port, or the importer, owner, consignee or agent, as the case may be, refer it to one of said General Appraisers as an officer of the Court, to take and return to the Court such further evidence as may be offered by the Secretary of the Treasury, Collector, importer, owner, consignee or agent, within sixty days thereafter, in such order and under such rules as the Court may prescribe; and such further evidence with the aforesaid returns shall constitute the record upon which said Circuit Court shall give priority to and proceed to hear and determine the questions of law and fact involved in such decision, respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and the decision of such Court shall be final, and the proper Collector, or person acting as such, shall liquidate the entry

accordingly, unless such Court shall be of the opinion that the question involved is of such importance as to require a review of such decision by the Supreme Court of the United States; in which case said Circuit Court, or the Judge making the decision may, within thirty days thereafter, allow an appeal to said Supreme Court; but an appeal shall be allowed, upon the part of the United States, whenever the Attorney-General shall apply for it, within thirty days after the rendition of such decision. On such original application, and on any such appeal, security for damages and costs shall be given as in the case of other appeals in cases in which the United States is a party. Said Supreme Court shall have jurisdiction and power to review such decision, and shall give priority to such cases, and may affirm, modify, or reverse such decision of such Circuit Court, and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly. All final judgments, when in favor of the importer, shall be satisfied and paid by the Secretary of the Treasury from the permanent indefinite appropriation provided for in Section 23 (24?) of this Act. For the purposes of this section the Circuit Courts of the United States shall be deemed always open, and said Circuit Courts, respectively, may establish, and from time to time alter, rules and regulations not inconsistent herewith for the procedure in such cases as they shall deem proper.

SEC. 25. That from and after the taking effect of this Act no Collector or other officer of the Customs shall be in any way liable to any owner, importer, consignee, or agent of any merchandise or any other person, for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise, or any other matter or thing as to which said owner, importer, consignee or agent of such merchandise might, under this Act, be entitled to appeal from the decision of said Collector or other officer or from any Board of Appraisers provided for in this Act."

Section 25 is manifestly confined in its operation to (1) rulings or decisions as to the classification of imported merchandise or as to the duties charged on imported merchandise; (2) collection of dues, charges or duties on or on account of imported merchandise; (3) any other matter or thing as to which there may be an appeal either (*a*) from the decision of the Collector, or (*b*) from the decision of a Board of Appraisers.

The ascertainment of what things are imported merchandise, unless it falls within category (3) is not contemplated in this section as a matter in respect to which collectors are to be relieved from liability.

As to what matters or things may there be an appeal? The only allowable appeals from Boards of Appraisers are provided for in Section 15. Such appeals bring up for review in Court only the decision of the appraisers *as to the construction of the law and the facts respecting the classification of imported merchandise, and the rate of duty imposed on imported merchandise under such classification.* They do not bring up for review the question of whether an article is "imported merchandise" or not. Nor is there anything in Section 15 which gives the least warrant for the idea that Congress regarded the ascertainment of that fact as a decision.

The only decisions of the Collector for which appeals are provided, are described in Section 14. They are (1) decisions as to the rate and amount of duties chargeable upon imported merchandise; (2) decisions as to dutiable costs and charges; (3) decisions as to fees and exactions of whatever character.

The word "dutiable" in category (2) shows that, that category relates only to costs and charges on "imported merchandise."

What do "decisions as to exactions of whatever character" in category (3) include? On their face these words appear to be of unlimited sweep and

scope. If a Collector were to take possession of a house and extort money from the owner as a condition of letting him have his house again, this act might be regarded as described by the words "decision as to exactions of whatever character." But did Congress mean any such thing? The Court will be loth to believe so; and it will search this section microscopically for limitations.

The word "decision" is itself a limitation. It implies the exercise of the judicial faculty, and presupposes a law which authorizes the Collector to exercise that faculty in respect of the matters which he assumes to decide. If, therefore, this statute is invoked to protect a Collector for taking private property under a decision that it is imported merchandise, some law must be found which authorizes him to make a decision, that is, to exercise judicial or quasi-judicial functions in respect of that matter. Thus we are thrown back to other statutes for the purpose of ascertaining the matters in respect of which the law contemplates that the Collector may exercise such functions.

There are other limitations in Section 25. The decisions from which an appeal may be taken are divided into three classes. But the notice of dissatisfaction, which is the foundation of the appeal in all cases, must be given *within ten days after the ascertainment and liquidation of duties, or within ten days after the payment of such fees, charges and exactions*, and the notice must set forth distinctly and specifically in respect to each entry or payment the reasons of objection thereto. Another condition of appeal is that "if the merchandise is entered for consumption" the full amount "of the duties and charges ascertained to be due thereon" must be paid. These provisions show that the broad phrase "exactions of whatever character" includes only such exactions as are connected with or relate to "imported merchandise." The same thing is shown still more

plainly by the next following provision describing the papers which are to be transmitted to the Board of Appraisers on appeal. "Upon such notice and payment the Collector shall transmit *the invoice and all the papers and exhibits connected therewith* to the Board." Plainly, therefore, the appeal brings up before the Board of Appraisers only decisions connected with or relating to "imported merchandise." A decision as to something which is not "imported merchandise" cannot be appealed from nor be reviewed by the Board of Appraisers.

It is clear, therefore, that Section 25 of the Administrative Act, does not relieve the Collector from liability if he takes possession of property under an unfounded claim that it is an "imported article."

In the District Court we were pressed with the proposition over and over again that instead of suing in admiralty for restitution we should have brought up the question whether the yacht is an imported article by paying the duties demanded by the Collector and then protesting and appealing under the provisions of the Administrative Act. Our answer then was and now is that this would have been a very dangerous course for our client to take. When he came before the Board of Appraisers or before the Circuit Court or before this Court in the proceedings contemplated by the Administrative Act, would he not have been met by something like this: "You have mistaken your remedy; if the yacht is not an imported article, neither the Board of Appraisers nor the Courts in this proceeding have anything to do with it. You started this proceeding by entering the yacht as imported merchandise. Both you and the Board of Appraisers and the Courts are therefore bound in this proceeding to regard it as imported merchandise. You are estopped from taking an inconsistent position."

(*C.*) The question whether the decisions of execu-

tive officers as to matters upon which their jurisdiction depends are of any binding force, has frequently been before this Court. It has been held in a large number and variety of cases that such decisions, if erroneous, are nullities.

Few executive officers have larger or more important quasi-judicial functions to perform than the officials of the Land Office; yet if the Land Office issues a patent for land to which the United States has no title, or for land which Congress has not authorized to be conveyed, or for land which has been reserved from conveyance, the patent is not simply irregular and voidable only in some direct proceeding provided by law for the purpose and standing as valid until avoided; but it is absolutely and for all purposes void *ab initio*.

Doolan *vs.* Carr, 125 U. S., 618.
Smelting Company *vs.* Kemp, 104 U. S., 636.
Sherman *vs.* Buick, 93 U. S., 209.
Best *vs.* Polk, 18 Wall., 112.
Wilcox *vs.* Jackson, 13 Peters, 511.
Polk's lessee *vs.* Wendal, 9 Cranch, 87.

So Military Officers seizing whiskey under a statute authorizing them to seize liquor which they have reason to suspect is about to be introduced into Indian country are liable as trespassers, if the place to which they suppose the whiskey is about to be taken is not Indian country.

Bates *vs.* Clark, 95 U. S., 204.

So Customs officials, taking property under an erroneous belief or under instructions of their superior officers that they are authorized to do so, are trespassers.

The Apollon, 9 Wh., 362.
Slocum *vs.* Mayberry, 2 Wh., 1.
Tracy *vs.* Swartwout, 10 Pet., 80.
McLean *vs.* Hager, 31 Fed. Rep., 602.

(*D.*) So far under this point we have assumed that the Collector did exercise some judgment and make some decision as to this yacht. The fact is not so.

According to his answer in the District Court, the Collector knows nothing about the yacht. According to his answer and according to his petition, he acted in *obedience* to the instructions of the Secretary of the Treasury. If there were any statute therefore which would protect a Collector against acts based upon his *decision* that the yacht is an "imported article" it would not avail in this particular case. What is needed is some statute authorizing the Secretary of the Treasury to decide that matter and protecting Collectors against the consequences of an erroneous decision on the part of the Secretary if they obey the Secretary's orders. There is no such statute.

(*E.*) The actual and only decision of the *Collector* was that this was a vessel taxable as such.

And he has taxed her as such under the light money statute (§ 4225).

## Third Point.

**There is no comity subsisting between the executive and judicial deparments of the Government of the United States which requires the judiciary to refrain from restoring to its owner property which has been taken by an executive officer without warrant of law.**

(*A.*) We do not suppose that the Attorney-General will put forward the converse of this proposition as a distinct ground for this Court's granting the writ prayed for, but very much of the argument with which we were met in the District Court was based upon the assumption of some such principle. Thus,

the facts connected with this yacht were waived aside. The District Attorney did not know whether the facts as we stated them in the libel were true or not. He did not know what the facts were. He did not care. It was even too much trouble for him to cause the records of the Custom House to be searched to find what they disclosed about the yacht. All that he knew and all that he cared for was that, on some undisclosed facts, the Solicitor of the Treasury had decided the yacht to be "liable to duty under the fair intendment of the Tariff Act," and the Secretary of the Treasury had thereupon instructed the Collector to "take the necessary steps for the appraisement of said vessel for duty and the assessment and collection of duty thereon according to law." This was a sufficient basis for him to argue that the correctness of the Solicitor's opinion could not be inquired into by a court of the United States; that the validity of the Secretary's order could not be challenged in a court of the United States; that the yacht was in the custody of the law, and therefore as much beyond the reach of the process of any court as if it were in another territorial jurisdiction; that the executive and judicial departments are co-ordinate, neither paramount over the other; that in cases of concurrent jurisdiction the Court or tribunal which first gets possession of property suspends the right of the other authority or tribunal, so long as its custody continues; and cases of that numerous class which hold that as between courts of concurrent jurisdiction, one cannot supersede the other in the custody of property, were cited ; and still other cases holding that the courts of the States cannot interfere with the executive officers of the United States were cited.

(*B.*) Of course, the true principle is, that the courts of the United States are the constitutional arbiters for determining the extent of the powers of the

other departments of the Government whenever any question as to the extent of those powers is presented by a "case" in law, equity or admiralty. If, in such a case, they find that the legislative department has exceeded the constitutional limits, they treat acts of Congress as nullities. If, in such a case, they find that executive officers have gone beyond their authority in interfering with persons or property they strip off their official badges and deal with them in their personal capacity as wrongdoers.

By the Constitution the Courts of the United States are armed with the spear whose touch of celestial temper "no falsehood can endure * * * but returns of force to its own likeness."

(*C.*) The notion that property in the possession of executive officers of the States or Nation is beyond the reach of the Courts of the United States has frequently been put forward and has invariably been met by this Court with a clear and unfaltering denial.

In United States *vs.* Peters, 5 Cranch, 115, Marshall, *C. J.*, said:

> "It certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of the Court and prevent their looking into the suggestion and examining the validity of the title."

In Osborne *vs.* The United States Bank, 9 Wheaton, p. 870, he said:

> "But his (the sovereign's) pretensions where they are not well founded cannot arrest the right of a party having a right to the thing for which he sues. Where the right is in the plaintiff and the possession in the defendant the inquiry cannot be stopped by the mere assertion of title in a sovereign. The Court must proceed to investigate the assertion and examine the title."

In U. S. *vs.* Lee, 106 U. S., pp. 218, 219, 220, 222 and 223, it is said:

> "Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the Government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the Government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to acts under its authority; for, as Mr. Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion. But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation * * * No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice

are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government. And the docket of this Court is crowded with controversies of the latter class. Shall it be said in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the Courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other Government which has a just claim to well-regulated liberty and the protection of personal rights."

## Fourth Point.

**There are no statutory provisions of the United States which prevent the exercise of ordinary Admiralty jurisdiction in such a case as this.**

I.

*Such is not the effect of Section 934 of the Revised Statutes.*

(A.) That section is as follows:

"All property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the cus-

> tody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

(*B.*) If this section means what it says, it relates only to property "taken or detained * * * under authority of any revenue law of the United States." It has no application to property taken or detained by revenue officers without authority of any law. It merely declares what was laid down by this Court in 1817 in the case of *Slocum* vs. *Mayberry*, 2 Wh., 1, where one of the question was whether an action of replevin could be maintained in a State Court for the cargo of a vessel which was detained by Customs officers under claim of authority therefor given by a statute which really authorized a detention of the vessel only.

(*C.*) We doubt, however, whether a broader meaning should not be given to the phrase "under authority of any revenue law of the United States" so as to make the section include property taken or detained under claim of authority therefor given by a revenue law as well as property which is in fact taken or detained under such a law. There is good reason (less potent, however, now than it was prior to the acts for the removal of causes) for excluding State courts from deciding the question whether Federal officers have exceeded their authority in taking or detaining property, and there is good reason for not allowing property taken or detained by Federal officers to be replevied or to be released on bail, according to the manner of replevin. Moreover, Congress by providing that the property to which this section relates, shall be subject to the orders and decrees of the courts of the United States, having jurisdiction thereof, seems to have had in mind the idea that the taking or detention may not have been really authorized.

We therefore shall assume in argument, that this section applies to the case of this yacht as property taken or detained under claim of authority therefor given by a revenue law of the United States.

(*D.*) The section so interpreted does not exclude the jurisdiction of the courts of the United States over the property to which it relates, but affirms that jurisdiction. It provides that all such property "*shall be* * * * subject * * * to the orders and decrees of the courts of the United States having jurisdiction thereof." The words "having jurisdiction thereof" undoubtedly imply some limitation, but only such limitation as requires us to refer to other statutes and legal principles to ascertain when and under what circumstances a court of the United States may have jurisdiction of any property or the taking or detention of any property. No court of the United States is forbidden to proceed with a case of which, independently of this statute, it would have jurisdiction.

The provision that the property to which the section relates shall be "deemed to be in the custody of the law" is not a limitation upon the power of the courts of the United States. That provision must be read with the provision that such property "shall be * * * subject * * * to the orders and decrees of the courts of the United States"; and it means that the custody of the executive officers shall remain inviolate until some court of the United States makes an order or decree thereupon.

So the provision that the property to which the section relates shall be irrepleviable, is not a limitation of power upon the courts of the United States. This provision must also be read with the other provision that such property "shall be * * * subject * * * to the orders and decrees of the courts of the United States,"—to the *orders* as well as to the

decrees of those courts; and it means that such property shall not be released on bail without a judicial order; it does not mean that such property shall not be bailed at all, but that it shall not be bailed *ministerially, as matter of right, without judicial intervention, after the manner of replevin.* The very reason for extending the scope of this section as to the property to which it relates is a reason of great weight for not narrowing that provision in it which was intended to indicate what courts of the United States may do. If State courts may not try the question whether revenue officers have a legal warrant for their acts in taking and detaining private property, and if property taken by revenue officers cannot be ministerially bailed all the more reason is there for finding in the statutes no inhibition upon courts of the United States to act in those matters. It would be a monstrous thing if no court had jurisdiction to restore to its owner property which had been taken by an executive officer without warrant of law.

To return to one of the illustrations with which we started: If the Collectors of Customs were to take possession of all the vessels from foreign ports which entered the ports of the United States, under the claim that they were imported articles and liable to import duties, is it to be believed that the courts of the United States are not competent to interfere and restore those vessels to their owners?

## II.

*The Administrative Act of June* 10, 1890, *does not have that effect.*

The only way in which this statute could be supposed to have the effect of excluding the ordinary admiralty jurisdiction would be similar to the way

in which the statutes relating to seizures for forfeiture have been held to exclude the trial of the question of the rightfulness of the seizure until there is an adjudication in the forfeiture case instituted upon the seizure. In such a case the seizure is the first step to the adjudication.

Under the Administrative Act, the taking of imported property by the Collector is not essential in order to give the Board and Court jurisdiction.

The taking of property has no relation to the questions which come up for decision before the Board of Appraisers or the Courts in the proceedings. The papers which go before the Board and the Court in those proceedings, do not even show whether there has been a taking of property or not.

## Fifth Point.

**The Statutes of the United States contain no provisions under which any other jurisdiction of the Federal Courts may be invoked in place of the ordinary exercise of Admiralty jurisdiction.**

I.

The jurisdiction conferred by the Administrative Act of June 10, 1890, cannot afford to the owner of the *Conqueror* the relief to which he is entitled.

That act confers upon the Courts of the United States only appellate jurisdiction to review the determination of the Collector in respect of the rate and amount of duty imposed upon imported merchandise. The courts of review can pass upon no questions which the Collector had not original

authority to determine. As we have already shown, the Collector had no authority to make any determination regarding any article which was not imported merchandise. If the *Conqueror* was not imported merchandise, the courts of review, under the Administrative Act, have no jurisdiction to determine any matter regarding it, and they cannot determine the very fact upon which depend the rights of the owner of the vessel.

II.

Under the Administrative Act the jurisdiction of the Federal Courts can be invoked in such a case as this, only by the owner of the vessel conceding *in limine*, as the basis of the proceeding and as the ground of his standing in court, the very fact which is at issue in this proceeding, to wit, that the vessel is imported merchandise.

As the condition of obtaining his day in court under the Administrative Act, the owner of this ves- must first make entry of her under a solemn declaration that she is imported merchandise, accompanied by an invoice declaring her to be imported merchandise, with a consular certificate stating in effect that she is imported merchandise, thus estopping himself at the commencement of his proceedings from maintaining the very fact upon which his rights depend.

## Sixth Point.

**The yacht, whether within the territorial jurisdiction of the District Court for the Southern District of New York at the time of the filing of the libel or not, was found by the Marshal within that jurisdiction, and exclusive possession thereof was rightfully taken by him under the process of the District Court for that District.**

(*A.*) We do not anticipate that if we are right in the propositions that the Collector's taking of the yacht was wrongful, and that such taking constitutes a case in admiralty, it will be seriously urged that no District Court was authorized to take the yacht into its own custody by process of attachment.

The general principle, undoubtedly is, that in admiralty cases *in rem* actual manucaption of the *res* under the process of the Admiralty Court is necessary.

> Supreme Court Admiralty, Rule 9.
> *Ex parte* Hoyt, 13 Peters, 279.
> Jennings *v.* Carson, 4 Cranch, pp. 22, 23.
> Burke *v.* Trevitt, 1 Mason, 100.
> Miller *v.* U. S., 11 Wall., 294.

The only suggestion which we have heard why a different course should have been taken in this case is based on R. S., Sec. 3086, which is as follows:

> "All merchandise or property of any kind seized under the provision of any law of the United States relating to the customs, shall, unless otherwise provided for by law, be placed and remain in the custody of the Collector or other principal officer of the Customs of the district in

which the seizure shall be made, to abide adjudication by the proper tribunal, or other disposition according to law."

This statute obviously applies only to seizures made under Penal Laws as the initial step in proceedings for a forfeiture or penalty. It was first enacted in 1866. Prior to that time it had been held in this Court in *ex parte Hoyt*, 13 Peters, 279, that the practice of the District Courts on the filing of informations for forfeiture to issue process under which the Marshal took seized property out of the possession of the Collector was proper and necessary to give those courts control of the property and to make their decrees in respect to it effective. The effect of the statute is merely in forfeiture cases to make the Collector an officer of the Court.

It is admitted in this case that the *Conqueror* was not seized under any law providing a penalty or forfeiture, and it follows, therefore, that this statute is wholly inapplicable to the present case.

Even if it were applicable, the facts disclosed in the record would afford an ample justification for the District Court's removing the Customs officials and putting the Marshal in possession. The Collector disclaimed holding the yacht "to abide adjudication," and refused to submit to the authority of the Court. His subordinates defied the Marshal. It required five weeks of time, three writs, a specific order and the use of physical force to put the District Court in control of the yacht. There never was a plainer case of open and deliberate contumacy and contempt of Court; so that if this had been a seizure case the District Court must have directed the Marshal to exclude the Collector and his subbordinates from the yacht.

(*B.*) A more serious question arises on the claim asserted in the answers in the District Court, and

sworn to in the petition here, that at the time the Collector took possession of the yacht and at the time the libel was filed she was lying in the waters of Richmond County, and was not within the territorial jurisdiction of the District Court for the Southern District of New York.

We do not know whether it is a fact that at those times the yacht was within the waters of Richmond County, but we have not controverted the allegation that such was the fact, because it would be a much simpler matter for us to file a new libel in the proper district than to try the question whether the yacht at the times referred to lay on one side or the other of the boundary line of Richmond County. We therefore admit the fact to be as alleged for the purposes of this application, and proceed to consider the questions of law which that fact raises.

The question is not whether a District Court of the United States can entertain an *in rem* suit in admiralty founded upon a tort committed in another district. Upon that there is no doubt (Propeller *Commerce*, 1 Black, 581; *The Slavers*, 2 Wall., at p. 403).

But the question is whether the waters of Richmond County are for all purposes outside the territorial jurisdiction of the District Court for the Southern District of New York and, if so, whether it is necessary in order that a District Court may acquire jurisdiction of the *res* in an *in rem* case, that the *res* be within the district at the time of filing the libel.

(*C.*) The only basis that we know of for the proposition that in *in rem* cases the property must be within the district at the time of filing the libel is the provision in admiralty rule 23, that in *in rem* cases the libel shall state "that the property is within the district."

We submit, however, that this provision is direct-

ory merely and that neither the allegation nor the fact are matters which go to the Court's jurisdiction either of the *cause* or of the *thing*. The provision in the rule is coupled with other provisions such as that the libel shall state the nature of the case, as for example, that it is a case civil and maritime, of contract or of tort, &c.; that in *in personam* cases the libel shall state the names and occupations and places of residence of the parties; that the libel shall also propound and articulate in distinct articles the various allegations of fact and that it shall conclude with a prayer of due process. These are not mandatory provisions. They ought to be complied with, but an omission to comply with them is a mere irregularity, not a jurisdictional defect.

We submit that jurisdiction exists if the property is *found and attached within the district* by the Marshal under the process issued upon the libel.

In this case the yacht was not attached under the original process while she lay in the waters of Richmond County. She was attached under the third process while she lay in the waters of Kings County, and those waters concededly are within the territorial jurisdiction of the District Court for the Southern District of New York?

*D.*) Are the waters of Richmond County outside of the territorial jurisdiction of the District Court of the Southern District of New York?

The doubt on this question is a cause of considerable inconvenience in the admiralty practice of the Southern District of New York. It would be beneficial if this Court could see its way clear to resolve the doubt one way or the other.

The doubt arises out of the fact that the statutes of the United States carving the Eastern District out of the Southern District and defining the waters where the courts of the two districts have concurrent jurisdiction, omit (no doubt by inadvertence) the

waters of Richmond County. So that, apparently, while the process of the Court for the Southern District runs all round Long Island, it stops at the middle of the channel separating Long Island from Staten Island. This conclusion, however, does not take account of the law of New York.

The present statutes of the United States defining the two districts are R. S., Sections 541 and 542.

The prior statutes were:

> Act of April 9th, 1813, and Act April 3d, 1818, 3 Stats., page 120 and page 413, establishing two districts in New York, the Northern and the Southern.
>
> Act February 25th, 1865, 13 Stats., 438, cutting the Eastern District out of the Southern District.

It will be seen that the Act of 1865 has rather the character of extending the jurisdiction of the Court for the Eastern District than of limiting the jurisdiction of the Court for the Southern District, so far as navigable waters, at least, are concerned. Under this statute the Southern District continued to include, and under Revised Statutes, Section 541, is declared to include (among other counties) the County of New York "and the waters thereof."

We must look therefore to the Statutes of New York to find what the waters of New York County are. They are New York Revised Statutes, Part I., Chapter II., Title 1, Sections 2 and 7. Section 7 provides:

> "The counties of Kings, Richmond and New York shall, for the purpose of serving all process, civil and criminal, have concurrent jurisdiction on the waters in the counties of Kings and Richmond, lying south of the bounds of the County of New York."

So, for the purpose of executing judicial process the waters of Richmond County have the legal char-

acter of being waters of New York County. Hence (it would seem) under the Act of Congress of 1865 and under the United States Revised Statutes, Section 541, process of the District Court for the Southern District of New York may be executed in the waters of Richmond County.

## Seventh Point.

**The application for prohibition should be denied.**

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*Of Counsel.*